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Supreme Court, U.S.
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No. (1)

In The Supreme Court of the United States

AL RABIEE and WILLIAM H. WHITEHEAD,
Petitioners,

v.

CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of the Courts,
Respondent.

On Appeal from the Decision of a Three Judge District Court for the Northern District of Alabama Appointed Pursuant to 42 U.S.C. § 1973c

JURISDICTIONAL STATEMENT PURSUANT TO RULE 18, RULES OF THE SUPREME COURT OF THE UNITED STATES GOVERNING APPEALS FROM THREE JUDGE UNITED STATES DISTRICT COURTS

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August 21, 2007

QUESTION PRESENTED

1. Whether this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1253 because Plaintiffs requested and the court denied injunctive relief?

2. Whether this Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c as a dispute over preclearance of an Alabama statute affecting judicial elections in Alabama and whether such statutes can be enforced by the Defendant without preclearance by the Department of Justice?

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I. STATEMENT OF THE BASIS FOR JURISDICTION OF APPEAL

The final judgment in this case was entered on June 5, 2007. Notice of Appeal to this Court was filed on June 22, 2007. (Appendix G). The federal statutes authorizing an appeal directly to this Court are 42 U.S.C. 1973c and 28 U.S.C. 1253. This jurisdictional statement is filed pursuant to Rule 18(3) of the Rules of this Court.

II. FEDERAL AND STATE STATUTES INVOLVED

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

> (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political

subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement

of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. (emphasis supplied).

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts.

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

***Ala.Code*, 1975, §12-24-1. Recusal of justice or judge due to campaign contributions.**

> The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

***Ala.Code*, 1975, §12-24-2. Filing by judges, justices, parties, and attorneys of disclosure statements concerning campaign contributions.**

> (a) Any justice or judge of an appellate or circuit court of the state shall file, at least two weeks prior

to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court with 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the

party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b)(2) (c), D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

***Ala.Code*, 1975, § 12-5-3. Department of Court Management established; powers and duties generally.**

(a) There shall be a state department to be known as the Department of Court Management. This department shall be specifically charged with the duty of assisting the Chief Justice of the Supreme Court of Alabama in connection with his duties as the chief administrative officer of all the trial courts of this state, the Chief Justice's task of insuring that the business of said courts of the state is attended with proper dispatch and the Chief Justice's task of seeing that the dockets of such courts are not permitted to become congested and that trial of cases, civil and criminal, is not delayed unreasonably.

(b) The department shall also perform the following duties:

(1) It shall work with the clerks and registers of all civil and criminal trial courts in the state to collect, obtain, compile and digest information and statistics concerning the administration of justice in the state.

(2) It shall serve as an agency to apply for and receive any grants or other assistance and to coordinate and conduct studies and projects in connection with the improvement of the administration of justice and trial courts in Alabama, and it may conduct such studies and projects with or without the assistance of consultants.

(3) It shall assist the Judicial Conference in its tasks.

(4) It shall promote, carry on and assist in programs designed to aid in the continuing legal and judicial education of justices, judges, clerks, registers and other court personnel and to work with any organization or association of such officials.

(5) It shall perform such other duties as may be assigned by the Chief Justice of the Alabama Supreme Court.

***Ala.Code,* 1975, § 12-5-6. Department to be responsible for trial court administration.**

Unless the Chief Justice otherwise directs, the Department of Court Management, under the direction of the Administrative Director of Courts, shall have the responsibility for trial court administration.

***Ala.Code,* 1975, 12-5-8. Administrative Director of Courts ex officio head of Department of Court Management and head of Administrative Office of Courts.**

The Administrative Director of Courts shall serve as ex officio head of the Department of Court Management and shall also be the head of the Administrative Office of Courts.

***Ala.Code*, 1975, 12-5-9. Administrative Director of Courts to assist Chief Justice with duties as administrative head of judicial system.**

The Administrative Director of Courts shall assist the Chief Justice of the Supreme Court of Alabama in connection with the Chief Justice's duties as administrative head of the judicial system of Alabama, the Chief Justice's task of seeing that the business of the courts of the state is attended with proper dispatch and the Chief Justice's task that the dockets of court are not permitted to become congested and that trials and appeals of cases are not delayed unreasonably.

***Ala.Code*, 1975, § 12-5-10. Powers and duties of Administrative Director of Courts generally.**

In addition to any other duties and responsibilities that may be assigned to the Administrative Director of Courts by the Chief Justice, he shall have the following duties and authority with respect to all courts, subject to the direction of the Chief Justice:

(1) To require the filing of reports, the collection and compilation of statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;

(2) To determine the state of the dockets and evaluate the practices and procedures of the courts and make recommendations concerning the number of judges and other personnel required for the efficient administration of justice;

(3) To prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks and registers of courts;

(4) To prepare and submit budget recommendations for state appropriations necessary for the maintenance and operation of the Unified Judicial System, with the exception of appellate courts, and to authorize expenditures from funds appropriated for these purposes as permitted or authorized by law;

(5) To investigate, make recommendations concerning and assist in the securing of adequate physical accommodations for the Unified Judicial System;

(6) To procure, distribute, exchange, transfer and assign such equipment, books, forms and supplies as are acquired with state funds or grant funds or otherwise for the Unified Judicial System;

(7) To make recommendations for the improvement of the operations of the Unified Judicial System;

(8) To prepare and submit an annual report on the work of the Unified Judicial System to the Chief Justice;

(9) To assist the Chief Justice in performing his duties relating to the transfer and assignment of justices and judges for temporary or specialized duty;

(10) To assist the Judicial Conference in its tasks;

(11) To promote, carry on and assist in programs designed to aid in the continuing education of justices, judges and other court personnel;

(12) To take necessary steps in the collection of unpaid court costs, fines and forfeitures;

(13) To serve as a liaison with the executive and legislative branches of the state government; and

(14) To perform such additional administrative duties as may be assigned by the Chief Justice.

***Ala.Code*, 1975, § 12-5-13. Coordination of functions and duties of administrative personnel of trial courts or local court systems; transfer and direction of expenditure of moneys appropriated to certain state agencies and courts.**

(a) In connection with the administration of justice within trial courts or within local court systems, the Administrative Director of Courts shall coordinate the functions and duties of administrative personnel, including court administrators and court administrative aides to judges, so that the overall administration of justice may function with efficiency and cooperation.

(b) The Administrative Director of Courts is authorized to direct the expenditure of moneys appropriated to the Administrative Director of Courts, Administrative Office of Courts, Department of Court Management or to any account for trial courts, circuit courts or district courts for any and all functions or projects directly or indirectly affecting the operation of any court, the administration of justice or continuing

education for judges and court-supportive personnel and may transfer moneys appropriated for such office, department or accounts to any one or more of such other accounts, office or department.

III. STATEMENT OF THE CASE

This is a Section 5 Voting Rights Act case brought pursuant to 42 U.S.C. § 1973c presenting the issue of whether an Alabama statute related to judicial elections must be precleared by the United States Department of Justice before it can be lawfully enforced. Private citizens may bring suit to enforce Section 5 of the Voting Rights Act. (42 U.S.C. § 1973c(a)). The complaint (Appendix E) alleged that *Ala.Code*, 1975, §§ 12-24-1 and 2 (the "Statutes") provide that successful judicial candidates who received as a campaign contribution in the last preceding election more than $2,000 for a position as an Alabama circuit judge or more than $4,000 for a position as an Alabama appellate judge from a party and/or counsel for a party in a case before them, were subject to disqualification upon the motion of a non-contributing party. The complaint further alleged that the Statutes were not required to be precleared by the United States Justice Department or the United States Court of Appeals for the District of Columbia pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The complaint alleged that Defendant wrongfully refused to enforce the Statutes until they were precleared under 42 U.S.C. § 1973c despite the opinion of the Alabama Attorney General that the Statutes do not require preclearance and the refusal of that official to submit the Statutes for preclearance. The complaint requested the appointment of a three judge district court pursuant to 42 U.S.C. § 1973c to determine whether or not the Statutes required preclearance before they could be lawfully enforced. The single district judge hearing the case concurred in the

appointment of the three judge court (Appendix C) and the Chief Judge of the United States Court of Appeals for the Eleventh Circuit issued an order appointing the three judge court consisting of Circuit Judge Tjoflat and District Judges Blackburn and Hopkins (Appendix D). The Defendant, Callie T. Dietz in her official capacity as Director of the Alabama Administrative Office of Courts, filed a motion to dismiss (Appendix F).

Count One seeks appointment of a three-judge panel and declaratory judgment that the Alabama Statutes do not require Section 5 preclearance. (App. E, Compl. ¶ 25). Count Two seeks injunctive relief under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment requiring Dietz to enforce the Statutes. (App. E, Compl. ¶ 26). Counts Three and Four contain alternative remedies in the event that the panel concludes that the Statutes do not require preclearance. Count Three seeks declaratory judgment that the Statutes require Section 5 preclearance. (App. E, Compl. ¶ 27). Count Four requests the panel to issue any and all orders necessary to compel the State of Alabama to submit the Statutes for preclearance. (App. E, Compl. ¶ 27).

Plaintiffs request relief in the form of two alternative schemes. Primarily, they seek a declaratory judgment that the Alabama Statutes do not require preclearance, and they ask for an injunction under 42 U.S.C. § 1983 ordering Dietz to enforce the Statutes. As an alternative, should the court declare that preclearance is required, Plaintiffs ask the court to issue such orders as are necessary to ensure that Alabama submits the Statutes for preclearance, pursuant to *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (holding that the goal of a three-judge panel facing a challenge under Section 5 must be to ensure that the covered jurisdiction submits the challenged legislation to the appropriate federal authorities for preclearance as expeditiously as possible.

On June 8, 2007, the three judge panel entered an opinion (Appendix A) and order (Appendix B) dismissing the case without prejudice.

Notice of Appeal to this Court was filed on June 22, 2007 pursuant to 42 U.S.C. § 1973c from the final order of the three judge court. The Clerk of the District Court, however, erroneously sent the Notice of Appeal to the Court of Appeals for the Eleventh Circuit. The Notice of Appeal was dispatched to this Court on June 25, 2007, after the error was called to the Clerk's attention.

IV. STATEMENT OF FACTS FROM DISTRICT COURT'S MEMORANDUM (Appendix A)

Plaintiffs are resident citizens of the State of Alabama, residing within the Southern Division of the Northern District of Alabama, registered to vote in the State of Alabama. *Ala. Code*, 1975, §§ 12-24-1 and 2 (the "Statutes") by their terms became effective on January 1, 1996. The Statutes among other things require the Alabama Supreme Court to adopt rules requiring attorneys to serve certificates of disclosure stating the amount, if any, of campaign contributions made by the attorneys, their clients, and related parties to the presiding judge (or appellate court judges) during the most recent election campaign. If the amount of the combined contributions from a party and his lawyer is more than $2,000 for a circuit judge or $4,000 for an appellate judge, the judge must recuse on motion of the opposing party. The judges and justices are required to file a financial statement with the Alabama Secretary of State showing the amount of campaign contribution from each contributor by name. If the judge does not file such a statement, Defendant is authorized to reduce his pay until he does so. As of February 13, 2007, neither statute has ever been enforced or obeyed by any official of the State of Alabama, including Defendant. (Appendix A at 6-7).

Under Alabama's unified judicial system, the state department charged with the duty of assisting the Chief Justice of the Supreme Court of Alabama in connection with his duties as chief administrative officer of the courts is the department of court management. Id. § 12-5-3(a). See also *id.* § 12-5-8 (Defendant, administrative director of courts is head of department of court management and head of administrative office of courts). Among other duties, the department of court management is required to work with the clerks of all state courts to "collect, obtain, compile and digest information and statistics concerning the administration of justice in the state." Id. § 12-5-3(b)(1). "Unless the chief justice otherwise directs, the department of court management, under the direction of the administrative director of courts, shall have the responsibility for trial court administration." *Id.* § 12-5-6.

§ 12-5-10 of the Alabama Code states the duties and authority of the administrative director of the courts. That section provides, in relevant part:

> In addition to any other duties and responsibilities that may be assigned to the administrative director of courts by the chief justice, he shall have the following duties and authority with respect to all courts, subject to the direction of the chief justice:
> (1) To require the filing of reports, the collection and compilation of statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;
>
> * * *
>
> (4) To prepare and submit budget recommendations for state appropriations necessary for the maintenance and operation of the

> unified judicial system, with the exception of appellate courts, and to authorize expenditures from funds appropriated for these purposes as permitted or authorized by law (emphasis supplied);
>
> * * *
>
> (13) To serve as a liaison with the executive and legislative branches of the state government;

The administrative director of courts also is responsible for the direction of expenditure of funds for all courts, for all functions, directly or indirectly affecting the operation of any court. *Id.* § 12-5-13(b).

Defendant has taken the position in response to numerous inquiries from Alabama circuit judges, that §12-24-2 constitutes a practice or procedure that must be submitted by the Alabama Attorney General ("AAG") to the Attorney General of the United States and"precleared" pursuant to 42 U.S.C. §1973c before becoming effective. Defendant further takes the position that because the Statutes have never been precleared, the Statutes are unenforceable and Defendant will not enforce them. The AAG has refused to seek preclearance based on his position that the Statutes do not require preclearance under 42 U.S.C. § 1973c, but the AAG has failed to enforce the Statutes.

The Plaintiffs are parties to pending litigation in Alabama state courts. Plaintiffs have asked that the presiding circuit judges in those cases recuse themselves because each of the judges received more than $2,000.00 in contributions from the defendants in those cases and their lawyers. The circuit judges denied the Plaintiffs' motions to recuse. In each case, Plaintiffs filed petitions for writ of

mandamus to the Alabama Supreme Court, which denied the petitions. In the case of Plaintiff Whitehead, all but one of the Alabama Supreme Court justices had received more than $4,000 from the defendants and their lawyers. Whitehead moved to recuse the eight justices who had received these funds from hearing his mandamus petition. The recusal motion was denied. The Chief Justice of the Alabama Supreme Court was one of the justices receiving more than $4,000 from the defendants in Whitehead's case and their lawyers.

There has been since 1996 a dispute between the United States Department of Justice ("DOJ") on the one hand and the AAG on the other as to whether the Statutes are subject to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, before they may be legally enforced. On March 7, 1996, the AAG submitted the Statutes to the DOJ for preclearance under §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. On May 13, 1996, the Justice Department agreed that the Statutes required preclearance stating that the recusal provision triggered by the reporting requirements would result in lower individual campaign contributions to candidates for judicial election, requiring candidates to seek contributions from a wider range of supporters. The DOJ reasoned that because of "societal discrimination" black candidates face greater obstacles in securing contributions from the public at large. Therefore, the Justice Department alleged the result would be to make it more difficult for black candidates to run successful campaigns thereby reducing the voting effectiveness of minority voters.

On May 20, 1996, the AAG wrote the DOJ advising that after "further review" he was convinced that the Statutes did not require preclearance under 42 U.S.C. § 1973c and withdrew the earlier submission of the Statutes for preclearance. On July 23, 1996, the DOJ responded to this

withdrawal of reference for preclearance by insisting that the Statutes did require preclearance, asserting as another reason to that stated above that Canon 7 of the Alabama Canons of Judicial Ethics had been submitted for preclearance which was similar to the Statutes. The DOJ further stated, that the statutes without preclearance "are not legally enforceable."

On July 30, 1996, the AAG responded that he "would not submit this law for preclearance." On July 18, 1997, the DOJ responded insisting that the Statutes be precleared and requesting the AAG to reconsider submitting the Statutes for preclearance. On July 23, 1997, the AAG informed the DOJ that the Statutes would not be submitted for preclearance.

There is no record of any further correspondence between the DOJ and the AAG regarding preclearance or enforceability of the statutes. Likewise, there is no record of any action taken by the DOJ to enforce its position that the statutes required preclearance. Neither the AAG or the governor have ever attempted to enforce the statutes.

On November 23, 1998, the clerk of the Supreme Court of Alabama, wrote to the judicial inquiry commission a letter stating that the Alabama Supreme Court had not adopted rules implementing the Statutes. The clerk stated, "The official reason for this is that the Act has not been precleared by the Justice Department." (emphasis supplied).

On January 6, 1999, Defendant's predecessor in response to an inquiry as to whether the Statutes would be enforced wrote a letter to the presiding circuit judge of Tuscaloosa County, Alabama, advising that based on the interpretation of the DOJ and the authorities quoted in the DOJ letter of July 18, 1997, "...our office must agree that

until this legislation is precleared, it is not legally enforceable and our office will not take any action for non compliance with [the Statutes] provision." (emphasis supplied). The Defendant's predecessor in response to a similar inquiry wrote a second letter dated January 11, 1999, to Alabama Circuit Judge L. Scott Coogler informing him that "...until this legislation is precleared, it is not legally enforceable and our office will not take any action for non compliance with [the Statutes] provisions."

On March 13, 2000, and June 8, 2000, the Defendant's predecessor reiterated to inquiries from other Alabama circuit judges that the Statutes were not legally enforceable and that AOC would not enforce them or take any action for noncompliance until the Statutes were precleared.

There are only two references in the opinions of the Alabama Supreme Court regarding the Statutes. In a concurring opinion in *Finley v. Patterson*, 705 So.2d 834, 835n 1 (Ala. 1997), Justice Cook stated that the statutes were in limbo because the dispute between the DOJ and the Attorney General had not been resolved. In *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 234 (Ala. 2004), Justice Brown stated that without preclearance by the DOJ it is doubtful the statutes were enforceable.

The memorandum opinion at Appendix A discusses Plaintiffs' previous action to require the AAG and the Alabama governor to enforce the Statutes. In that case, the three judge district court dismissed the Plaintiffs' complaint because the AAG and the governor agreed with Plaintiffs that the Statutes did not require preclearance so there was no case and controversy. That three judge district court held that the admitted fact that the AAG and the governor had taken no steps to enforce the Statutes for the last ten years and that Plaintiffs sought in that action to compel them to do so did not create a case and controversy.

The three judge district court dismissed Plaintiffs' complaint in this case because: (1) Defendant had no duty to enforce the Statutes until the Alabama Secretary of State informed Defendant that a judge had not complied with the disclosure requirements of *Ala.Code*, 1975, § 12-24-2(a) and, when and if that happened, Defendant's only duty was purely a ministerial one of cutting off the judge's salary until the judge did comply as required by § 12-24-2(b) (Appendix A at 15-16); (2) Plaintiffs lack "standing" because they do not allege any injury as a result of failure to enforce the non-disclosure requirements of § 12-24-2(a), but only allege injury from the judges' failure to recuse (*id.* at 16-17); (3) it is the duty of the AAG to submit the Statutes for preclearance and not the duty of Defendant so that the causation prong of the "standing" analysis is not met (*id.* at 17-18); and (4) there is no "redressable injury" and thus no "case and controversy; because Defendant does not have the power to enforce the Statute or submit it for preclearance (*id.* at 18-19).

V. REASONS COURT SHOULD TAKE JURISDICTION

This case represents the classic type of dispute toward which 28 U.S.C. § 1253 and 42 U.S.C. § 1973c are directed. As to § 1253, the three judge court denied Plaintiffs' request for an injunction thus meeting the statute's requirement for a direct appeal to this Court.

The DOJ insists that the Statutes require preclearance while the AAG insists they do not. But, neither has taken any action to implement its view. The Defendant in this case advises the judicial officers it is regulating that it will not enforce the Statutes until they are precleared. The AAG takes one position and Defendant another thus meeting § 1973c's requirements for a direct appeal to this Court.

Defendant holds itself out to the Alabama judges subject to the Statutes as having the power to not only enforce the Statutes, but the power and discretion to decide whether it will do so or not do so.

The Alabama statutes that govern the powers and duties of the Defendant clearly contradict the district court panel's conclusion that Defendant is a mere ministerial functionary in the enforcement of the Statutes who cannot take any action to enforce the Statutes unless and until the Alabama Secretary of State informs it that a judge has not filed the required disclosure. The district court fails to consider the fact that in view of Defendant's often stated view that the Statutes will not be enforced without pre-clearance, it would be a futile act for the Alabama Secretary of State to make reports to Defendants.

In view of the fact that the AAG and the governor have taken the position that the Statutes do not require preclearance and Defendant is charged with the enforcement of the Statutes because of the duties and powers granted and required of Defendant by the above-referenced Alabama statutes, the district court is wrong in its decision denying Plaintiffs' "standing" because that decision depends on the district court's erroneous analysis of Defendant's role in enforcing the Statutes.

The second error in the district court's standing analysis is that Plaintiffs do not show an injury as the result of the violation of the Statutes because any failure to enforce the Statutes is not "fairly traceable" to Defendant. (Appendix A at 17-18). The district court says any injury Plaintiffs sustained was caused by the "Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. (*id.* at 18).

These decisions are wrong. Plaintiffs do have "standing" to bring this action. First, the finding that the AAG is responsible for Plaintiffs' injury is contrary to the facts. Plaintiff's suit against the Alabama Attorney General was dismissed by the district court for lack of a case and controversy.

Second, Defendant has the statutory authority to "require" the Secretary of State to submit reports on judges who have and have not filed disclosures. *Ala.Code*, 1975, § 12-5-10(1).

Third, Defendant also has discretion in the use of court funds in addition to and outside the Statutes. The Defendant is responsible for the expenditure of all funds directly or indirectly affecting the operation of any court. (*id.* at 12-5-13(b)).

It is clear from its communications with the Alabama judges who have asked if the Statutes are in effect that Defendant is deliberately refusing to enforce the Statutes until they are precleared. It is not reasonable to hold that Defendant, the administrator of the Alabama court system, has not controlled whether Alabama judges enforce the Statutes. The district court held that recusal and non-disclosure are not "traceable" to Defendant. This ignores the fact that where the court administrator says the Statutes are not enforceable until precleared, the failure of Alabama judges to enforce them is "traceable" to that position of Defendant.

VI. CONCLUSION

This Court has jurisdiction to hear and decide this appeal because the three judge district court denied Plaintiffs' request for injunctive relief (28 U.S.C. § 1253) and because this case comes squarely within 42 U.S.C. § 1973c.

Respectfully submitted,

Roger C. Appell (ASB-2211-a60r)
301 19th Street North
Birmingham, AL 35203
(205) 252-9462
Counsel for Petitioners,
Al Rabiee and William H. Whitehead

August 21, 2007

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AL RABIEE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of Courts,	)	**CASE NO.: 2:07-CV -302- VEH**
	)	
	)	
	)	
Defendant.	)	

GERALD BARD TJOFLAT
U.S. Circuit Judge
SHARON LOVELACE BLACKBURN
U.S. Chief District Judge
VIRGINIA EMERSON HOPKINS
U.S. District Judge

MEMORANDUM OPINION

PER CURIUM:

This case is currently before the court on the Motion to Dismiss filed by defendant Callie T. Dietz ("Dietz"). (Doc. 13.)[1] Upon consideration of the record, the submissions of

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[1] Reference to a document number, ["Doc. __"], refers to the number assigned to each document as it is filed in the court's record.

the parties, and the relevant law, the panel is of the opinion that the Motion is due to be granted.

I. INTRODUCTION

Plaintiffs Al Rabiee and William H. Whitehead initiated this declaratory judgment action pursuant to 28 U.S.C. § 2201, against Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts. Plaintiffs assert claims under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, and under the Due Process Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. § 1983.

Section 5 of the VRA governs changes in voting procedures, with the purpose of preventing jurisdictions covered by its requirements from enacting or seeking to administer voting changes that have a purpose or effect of denying or abridging the right to vote on account of race or color. *Lopez v. Monterey County, CA,* 519 U.S. 9, 12 (1996). Pursuant to Section 5, as a "covered jurisdiction," Alabama must obtain judicial preclearance from the United States District Court for the District of Columbia, or administrative preclearance from the United States Attorney General, before enacting or seeking to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting ... " 42 U.S.C. §§ 1973b, 1973c(a). "To obtain administrative preclearance of a new law affecting voting, a covered jurisdiction must submit the new law to the Attorney General of the United States. If the Attorney General does not object within 60 days of submission, the jurisdiction may enforce the legislation." *Lopez,* 519 U.S. at 12. Private citizens may bring suit to enforce Section 5, which "shall be heard and determined by a [district court] of three judges ... " 42 U.S.C. § 1973c(a).

A. Summary of Plaintiffs' Claims

Plaintiffs' Complaint concerns an Alabama statute codified at Ala. Code §§ 12-24-1,12-24-2 (the "Alabama Statute"), and contains four counts. Count One seeks appointment of a three-judge panel and declaratory judgment that the AlabamaStatute does not require Section 5 preclearance. (Doc. 1, Compl. ¶ 25.) Count Two seeks injunctive relief under 42 V.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment requiring Dietz to enforce the statute. (Doc. 1, Compl. ¶ 26.) Counts Three and Four contain alternative remedies in the event that the panel
concludes that the Statute does require preclearance.[2] Count Three seeks declaratory judgment that the Statute requires Section 5 preclearance. (Doc. 1, Compl. ¶ 27.) Count Four requests the panel to issue any and all orders necessary to compel the state of Alabama to submit the statute for preclearance. (Doc. 1, Compl. ¶ 27.)

B. History of the Alabama Statute

The Alabama Statute was signed into law as Act No. 95-648, Ala. Acts 1995, on July 31,1995: effective beginning with the first election after January 1, 1996. It was intended "to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate, the justice or judge received a substantial contribution" from a party in the case, attorneys

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[2] The third and fourth counts in Plaintiffs' Complaint are both labeled Count Three. The panel will assume that this is a mistake by Plaintiffs' counsel and will refer to the final count as Count Four.

for the party, or certain other individuals. Ala Code. § 12-24-1. Under the Statute, a contribution of more than four thousand dollars ($4,000) to the campaign of a justice or judge of an appellate court, or a contribution of more than two thousand dollars ($2,000) to the campaign of a circuit judge, is considered a "substantial contribution." *See* Ala. Code § 12-24-2(c). The Statute requires, *inter alia:* (1) all Alabama state court justices and judges to file with the Secretary of State annual public statements disclosing campaign contributions; (2) the Alabama Supreme Court to promulgate rules of court requiring attorneys to serve on all counsel of record in each case certificates of disclosure stating the amount, if any, of campaign contributions made to the most recent election campaign of the presiding justice or judge by all attorneys of record, any attorney with whom they practice, their clients, and related parties; and (3) upon the filing of a written notice of recusal, Alabama state court justices and judges to recuse from any case in which the attorneys, their clients, or the related parties contributed over a certain amount of money to the judge's campaigns. See Ala. Code § 12-24-2.

In March 1996, then Alabama Attorney General Jeff Sessions submitted the Alabama Statute to the United States Department of Justice ("DOJ") for preclearance under Section 5 of the Voting Rights Act. On May 13, 1996, the DOJ responded requesting additional information from the Attorney General including, *inter alia:* the rule or rules adopted by the Alabama Supreme Court pursuant to the Statute; a list of each campaign contribution for each successful candidate for each Alabama justice and judge position since 1989; and a description of each instance since 1989 in which a party to litigation in the Alabama courts had sought recusal based on a judicial campaign contribution. The DOJ agreed that the Statute required

preclearance, reasoning that the recusal provision triggered by the reporting requirements would result in lower individual campaign contributions to candidates for judicial election, requiring candidates to seek contributions from a wider range of supporters. According to the DOJ, because of "societal discrimination," black candidates face greater obstacles in securing contributions from the public at large. Therefore, the DOJ concluded that enforcement of the Alabama Statute would make it more difficult for black candidates to run successful campaigns, thereby reducing the voting effectiveness of minority voters.

Attorney General Sessions responded on May 20, 1996, by withdrawing the Statute from submission, asserting that, after further review, his office had determined that it does not require preclearance because it does not "bear a direct relation on voting itself." The Alabama Attorney General's position relied on *Presley* v. *Etowah County Commission,* 502 U.S. 491, 510 (1992). The DOJ responded on July 23 1996, expressing its disagreement with the Attorney General's reasoning, and requesting that the Statute be re-submitted for preclearance review. The Attorney General responded by letter dated July 30, 1996, stating, *inter alia:* "The State of Alabama will enforce Act No. 95-648, and the Attorney General of Alabama will not submit this law for preclearance. Section 5 does not apply. If you disagree, we respectfully suggest that you proceed to enforce your interpretation of Section 5 in this context." Almost one year later, in a letter to the Alabama Attorney General dated July 18, 1997, the DOJ again insisted that the Statute be submitted for preclearance. The DOJ requested that the Attorney General "inform us of the action the State of Alabama plans to take concerning this matter." The new Alabama Attorney General, now Judge William Pryor, responded on July 23,

1997, by informing the DOJ that the Statutes would not be submitted for preclearance because, in his opinion, Section 5 does not apply. There is no record of further correspondence between the Alabama Attorney General and the DOJ regarding the preclearance of the Alabama Statute.

The Attorney General has never taken steps to enforce the Statute. Moreover, the Alabama Supreme Court has never promulgated rules as required by the statute, taking the position that, pursuant to Section 5 of the Voting Rights Act, the Statute is not legally enforceable until it has been precleared by the Attorney General or the United States District Court for the District of Columbia. On November 23, 1998, the Clerk of the Supreme Court of Alabama stated by letter to the judicial inquiry commission that "the official reason" for the Supreme Court's failure to adopt rules implementing Ala. Code § 12-24-2(b) was because "the Act had not been precleared by the Justice Department." The Alabama Supreme Court has also indicated its position, directly and indirectly, in several opinions. *Ex parte McLeod,* 725 So.2d 271,274 n.3 (Ala. 1998) (noting that "preclearance of [the Statute] by the United States Justice Department is still pending" and stating that "it would be futile for this court to impose on judges a duty to disclose contributions when, upon the Justice Department's approval of the new statute, that duty will shift to the contributing parties."); see also *Finley* v. *Patterson,* 705 SO.2d 834, 835 n. 1 (Ala. 1997) (Cook, 1., specially concurring, noting that the enforcement of the Alabama Statutes "is in legal limbo" because there has been no resolution to the dispute between the Alabama Attorney General and the DOJ); *Bracking* v. *Trimmier Law Firm,* 897 So. 2d 207, 233-34 (Ala. 2004) (Brown, 1., denying a motion to recuse under the Alabama Statute, stating that because the Statute has not obtained preclearance, "it is

questionable whether [it is] even enforceable," citing *Ex parte McLeod*, and Finley).

The Alabama Administrative Office of Courts ("AOC"), and presumably its Director, defendant Dietz, have likewise taken the position that the Alabama Statute requires preclearance under Section 5 of the VRA. On January 6, 1999, Frank W. Gregory, then-Director of the AOC, wrote a letter to the presiding circuit judge of Tuscaloosa County advising that, in light of the DOJ's position as stated in its July 18, 1997 letter, "our office will not take any further action for non compliance with [the Statute's] provision[s]." The AOC reiterated its position to other Alabama Circuit Judges in letters dated January 11,1999, March 13,2000, and June 8, 2000. It appears that the last correspondence on this issue was the AOC's June 8, 2000 letter.

Plaintiffs contend that the Statute was adopted for their use and benefit and the use and benefit of those similarly situated and, therefore, the failure or refusal to enforce the Alabama Statute is a violation of their rights under the Due Process Clause of the Fourteenth Amendment. Both Plaintiffs are parties in litigation currently pending in Alabama state court.[3] Both have moved for the recusal of the presiding judges in their respective cases pursuant to the terms of the Alabama Statute.

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[3] Plaintiffs ' cases are styled: *William H. Whitehead* v. *Bradley, Arant, Rose & Whi te, LLP, et at.*, CV - 2005 -614 3 (Circuit Court of Jefferson County, Alabama; Hon Tom King presiding); *Terry Slaughter* v. *Al Rabiee, et al.*, CV-2005-7674 (Circuil Court of Jefferson County, Alabama; Hon. Robert Vance, Jr. presiding).

Plaintiffs contend that each judge has received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would require recusal under Ala. Code. § 12-24-2(c). Their motions to recuse were denied. Both Plaintiffs filed petitions for a writ of mandamus to the Alabama Supreme Court. Plaintiff Whitehead also filed a motion to recuse all but one of the Justices of the Supreme Court on consideration of his petition on the ground that each had received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would require the Justices' recusal under the Statute. The Supreme Court denied Whitehead's motion to recuse, as well as both Plaintiffs' petitions for mandamus.

C. Plaintiffs' Previous Action

Plaintiffs Rabiee and Whitehead filed a similar action in this court on July 20, 2006 against Governor Robert Riley and Attorney General Troy King on virtually identical grounds. CV-06-1395-RDP. A three-judge panel convened in that case included U.S. Circuit Judge Frank M. Hull, and U.S. District Judges David R. Proctor and Virginia Emerson Hopkins. In their complaint, Plaintiffs requested a declaratory judgment that Ala. Code §§ 12-24-1, 12-24-2 do require preclearance under Section 5 of the VRA. However, in their trial brief, Plaintiffs abandoned their original position, and argued that the Alabama Statute does not need to be precleared. As noted above, the Alabama Attorney General has maintained his position that the Alabama Statute does not require Section 5 preclearance. Governor Riley also took that position. Because the position Plaintiffs stated in their trial brief mirrored that of the defendants, the panel determined that no "case" or "controversy" existed as is required for federal court

jurisdiction under Article III of the United States Constitution.[4] Plaintiffs' complaint was dismissed.

Plaintiffs filed this action against the Director of the AOC in her official capacity. Here, Plaintiffs have taken the position they eventually reached in their previous action, that the Alabama Statute does not require preclearance. Plaintiffs have thus avoided the particular Article III problem they faced in their former action, as the AOC's position on the issue of preclearance ofthe Alabama Statute is directly adverse to Plaintiffs' position. However, Plaintiffs again fail to meet the "case or controversy" requirement of Article III and the Declaratory Judgment Act.

II. DISCUSSION

Plaintiffs request relief in the form of two alternative schemes. Primarily, they seek a declaratory judgment that the Alabama Statute does not require preclearance, and they ask for an injunction under 42 U.S.C. § 1983 ordering Dietz to enforce the statutes. As an alternative, should the court declare that preclearance is required, Plaintiffs ask the court "to issue such orders as are necessary to ensure that Alabama submits the Statutes for preclearance," pursuant to Lopez v. Monterey County, 519 U.S. 9, 23 (1996) (holding that the goal of a three-judge panel facing a challenge under Section 5 must be to ensure that the

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[4] Article III of the Constitution restricts the jurisdiction of federal courts to actual "cases" or "controversies." U.S. Const. Art. III, § 2, cl. 1; *see Elend* v. *Basham*, 471 F.3d 1199, 1204 (lith Cir. 2006). Likewise, the Declaratory Judgment Act applies only in cases involving an "actual controversy." 28 U.S.C. § 2201.

covered jurisdiction submits the challenged legislation to the appropriate federal authorities for preclearance as expeditiously as possible). Dietz moves the court to dismiss Plaintiffs' Complaint on the grounds that she is not a proper defendant in this action because neither she nor the AOC have the authority to enforce the Alabama Statute.[5]

Although the question of standing is not addressed in the parties' briefs, "the federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990) (internal quotations omitted; alterations in original)). Any plaintiff seeking to invoke a federal court's jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "If a plaintiff lacks standing, the 'case' or 'controversy' requirement of Article III § 2 of the U.S. Constitution is not satisfied, and the case must be dismissed." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1304 (11th Cir. 2004). The "irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U,S. at560. First, the plaintiff must be able to show that he has suffered an injury in fact – an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between that injury and the challenged

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[5] Defendant also contends that she is shielded from Plaintiffs' claims by Eleventh Amendment immunity. Because the panel finds that Plaintiffs' Complaint fails on the threshold issue of standing, it will not reach the issue of Dietz's immunity.

action of the defendant the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. *Id.* Finally, it must be likely, rather than merely speculative, that a favorable judgment will redress the plaintiffs injury. *Id.* at 561.

Plaintiffs' alleged injury is the denial of their right under Ala. Code § 12-242(c) to require the recusal of their presiding Alabama circuit judges, each of whom Plaintiffs allege received more than $2,000 from Plaintiffs' opposing parties and/or the opposing parties' lawyers. Plaintiff Whitehead also alleges the denial of his right to require the recusal of certain justices of the Alabama Supreme Court on consideration of his petition for writ of mandamus, each of whom Plaintiffs allege have received more than $4,000 from Plaintiff Whitehead ' s opposing party and/or the opposing party's lawyers. The actions Plaintiffs challenge, therefore, appear to be the denial of their motions to recuse by the Alabama circuit judges and certain justices of the Alabama Supreme Court which, in turn, was caused by one of two things. If the Statute does not require preclearance, the injury was caused by the failure to enforce the Statute; however, If the Statute does require preclearance, the injury was caused by the failure to submit the Statute for preclearance so that it could then be enforced. For the purposes of the standing inquiry, the panel will assume, without deciding, that Plaintiffs have alleged an injury in fact. That injury however, is caused by factors independent of Dietz, and thus cannot be redressed by declaratory or injunctive relief against her.

Under United States Supreme Court and Eleventh Circuit precedent, "when a plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an

appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Socialist Workers Party v. Leahy,* 145 F.3d 1240, 1248 (11th Cir. 1998); see also *American Civil Liberties Union v. The Florida Bar,* 999 F .2d 1486,1490 (11th Cir. 1993) (when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant); *Diamond v. Charles,* 476 U.S. 54,64 (1986). Although Plaintiffs in this case are not seeking a declaration as to the constitutionality of a state law, we believe that the above stated principal nonetheless applies. In order to be a proper defendant in this case, a state official must be charged with the duty of enforcing the Statute at issue, and/or with the duty of submitting new laws affecting voting rights to the DOJ for preclearance under Section 5 of the VRA. Unless Defendant Dietz has the requisite authority, this panel's determination of Plaintiffs' claims would amount to nothing more than an advisory opinion prohibited by Article III's case and controversy requirement. See *Church* v. *City of Huntsville,* 30 F.3d 1332,1335 (11th Cir. 1994) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 471-72 (1982)). We can find no Alabama law or rule of any kind bestowing upon the AOC the general authority to enforce any law or to submit new enactments for Section 5 preclearance.

Plaintiffs contend that, in the last sentence of Subsection (a), the Alabama Statute explicitly imposes responsibility for its enforcement upon the AOC. The Alabama Statute provides, in pertinent part, as follows:

> (a) Any justice or judge of an appellate or circuit court of this state shall file ... with the Secretary of State, a statement disclosing the

names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. ... **When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.**

(b) The Supreme Court [of Alabama] shall provide ... a rule or rules ... as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record . . . Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case ... [T]he court may impose sanctions provided for by Rule 37(b)(2)(C), (D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action

> assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount ... below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge, or else such party shall be deemed to have waived such right of recusal. ..

Ala. Code § 12-24-2 (emphasis added). The sentence to which Plaintiffs refer does impose an obligation upon the AOC to withhold compensation from justices and judges who have failed to comply with the disclosure requirements set out in Subsection (a). Plaintiffs would have the panel interpret this provision as giving the AOC the broad authority to enforce all provisions of the Statute. However, as Defendant points out, the AOC's duty to withhold a justice's or judge's compensation is triggered only by notification from the Secretary of State of a justice's or judge's non-compliance with Subsection (a)'s disclosure requirements. The AOC is the proper agency for this duty, as it is responsible for the payment of justice's and judge's salaries. See Ala. Code § 12-5-13(b). The AOC may have a great deal of discretion with regard to expenditure of funds for the courts generally, however, under the Statute, it has

no discretion. Its duty is purely ministerial. The Statute does not give the AOC discretion to determine whether a justice or judge has complied with the disclosure requirements set out in Subsection (a), or if that justice's or judge's compensation is to be suspended. The discretion to make those decisions is vested explicitly in the Secretary of State. The AOC's sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the Statute, the AOC has no duty or authority thereunder whatsoever.

More importantly, Plaintiffs do not allege any injury caused by the non-enforcement of the disclosure requirements of Subsection (a). They have attempted to assert their rights under Subsection (c), which sets out the circumstances under which parties have the right to require the recusal of the justice or judge presiding over their case. The injury Plaintiffs allege as a result of the non-enforcement of the Statute, is the denial of their motions for recusal of their state court judges.[6] Subsection (c) does not explicitly impose any responsibility for its enforcement upon the AOC, and Plaintiffs do not contend that it does.

Likewise, we are aware of no authority under which the AOC is charged with the duty of submitting a newly enacted law to the *DOJ* for preclearance under Section 5 of the VRA. Should the panel determine that the Alabama Statute does require preclearance, the remedy Plaintiffs

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[6] The traditional relief for the denial of a motion to recuse is a motion for a new trial under Ala. R. Civ. P. 59 or 60.

request is for the court to "issue such orders as are necessary to ensure that Alabama submits the Statute[] for preclearance as expeditiously as possible ... "(Doc. 1, Compl. at 14, ¶ 27.) As is apparent from the history of the Alabama Statute as summarized above, the submission of new statutes for preclearance under Section 5 of the VRA is the duty of the Attorney General of Alabama. Moreover, the determination of whether to submit a particular statute for preclearance is within his discretion.

Because Dietz is not the state official charged with the duty of enforcing the Statute or submitting the Statute for preclearance, any injury allegedly caused by the failure to do so is not "fairly traceable" to any action of Dietz or the AOC. Rather, any such injury is the result of inaction of third parties not before this panel: the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. Injury suffered at the hands of these third parties, "is insufficient by itself to establish a case or controversy in the context of this suit," for neither has been named as a defendant. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Under the circumstances, Plaintiffs have failed to meet the causation prong of the standing analysis.

For much the same reasons as outlined above, Plaintiffs cannot meet the third component of the standing inquiry - redressability. The Supreme Court has explained redressability as follows:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of

> damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt v. Helms, 482 U.S. 755, 761 (1987) (emphasis in original). "Absent a redressable injury a judicial determination of plaintiffs claim would amount to an advisory opinion prohibited by Article III's case and controversy requirement." *Church,* 30 F.3d at 1335. The alternative remedies Plaintiffs seek - an injunction requiring the enforcement of the Alabama Statute, or an appropriate order to ensure that Alabama submits the Statute for preclearance - cannot be redressed by the AOC because it does not have the power to take either action. No remedy handed down against the Dietz or AOC could abate Plaintiffs' alleged injury. Thus, Dietz is not a proper defendant to this matter, and no "case or controversy" within the scope of Article I I I exists. Dietz's Motion to Dismiss is due to be granted.

III. CONCLUSION

Based on the forgoing, the panel concludes that Defendant's Motion to Dismiss is due to be granted. An Order granting Dietz's Motion and dismissing Plaintiffs' case will be entered contemporaneously herewith.

DONE and **ORDERED** this the 8th day of June, 2007.

VIRGINIA EMERSON HOPKINS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

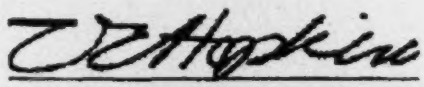
AL RABIEE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
CALLIE T. DIETZ, in her	)	**CASE NO.:**
official capacity as Director of	)	**2:07-CV -302- VEH**
the Alabama Administrative	)	
Office of Courts,	)	
	)	
Defendant.	)	

GERALD BARD TJOFLAT
U.S. Circuit Judge
SHARON LOVELACE BLACKBURN
U.S. Chief District Judge
VIRGINIA EMERSON HOPKINS
U.S. District Judge

ORDER OF DISMISSAL

Pursuant to the per curiam Memorandum Opinion entered on this date, the Motion to Dismiss (Doc. #13) filed by Defendant Callie T. Dietz ("Dietz") in her official capacity as Director of the Alabama Administrative Office of Courts (the "AOC") on April 12, 2007, is **GRANTED** on the basis that no "case or controversy" within the scope of Article III exists, and Plaintiffs' case is **HEREBY DISMISSED WITHOUT PREJUDICE.**

DONE and **ORDERED** this the 8th day of June, 2007.



VIRGINIA EMERSON HOPKINS
United States District Judge

APPENDIX C

Case 2:07-cv-00302-VEH Document 7
Filed 03/22/2007 Page 1 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
619 Hugo L. Black United States Courthouse
1719 5th Avenue North
Birmingham, Alabama 35203

CHAMBERS OF VIRGINIA EMERSON HOPKINS
United States District Judge

Telephone (205) 278-1950
Facsimile (205) 278-1955

February 22, 2007

The Honorable J. L. Edmondson
Chief U.S. Circuit Judge
United States Court of Appeals
56 Forsyth Street, NW, Room 416
Atlanta, Georgia 30303

Re: *Al Rabiee & William H Whitehead v. Callie T. Dietz, in her official capacity*
2:07-CV-302-VEH
Three-Judge Court (Non-Redistricting Case)

Dear Chief Judge Edmondson:

Pending before me is an application for relief in the above-referenced case, which I believe an Act of Congress requires to be heard and determined by a district court of three judges designated by you. This case, brought under

Section 5 of the Voting Rights Act, has just recently been filed.

If you agree with my conclusion, I request that you designate such a panel pursuant to 42 U.S.C. § 1973c (a) and 28 U.S.C. § 2284. For your reference, I have enclosed a copy of Plaintiffs' complaint. The request for the appointment of a three judge panel is included in count one.

As an aside, a prior similar case filed in 2006, *Al Rabiee & William H Whitehead v. Robert Riley, et al.*, 2:06-CV-1395-RDP, was recently dismissed without prejudice on lack of case or controversy grounds, by a three-judge panel in which I (upon Judge Coogler's recusal), Judge Hull, and Judge Proctor served per your order dated November 21,2006.

Thank you in advance for your consideration. Please do contact me if you have any questions.

Sincerely,

s/Virginia Emerson Hopkins
Virginia Emerson Hopkins
United States District Judge

Attachment
VEH:acw

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AL RABIEE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of Courts,	)	**CASE NO.: 2:07-CV -302- VEH**
	)	
Defendant.	)	

1. **Requesting Judge**
   Honorable Virginia E. Hopkins
2. **District Judge**
   Honorable Sharon Lovelace Blackburn
3. **Circuit Judge**
   Honorable Gerald B. Tjoflat

DESIGNATION OF THREE-JUDGE COURT
(42 U.S.C. § 1973c and 28 U.S.C. § 2284)

ORDER

The Requesting Judge, Honorable Virginia E. Hopkins, to whom an application for relief has been presented in the above cause, having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three judges, I J. L. Edmondson, Chief Judge of the Eleventh Circuit, hereby designate Circuit Judge Gerald B. Tjoflat and District Chief Judge Sharon Lovelace Blackburn to serve with the

Requesting Judge, Virginia E. Hopkins, as members of the said Court to hear and determine the action.

This designation and composition of the three-judge court is not a prejudgment, express or implied, on whether this case is properly one for a three-judge, rather than a one-judge, court. This matter is best determined by a three-judge court as this approach enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding district judge, or both. The parties will be afforded the opportunity to brief and to argue all questions before the three-judge court, either preliminarily or on the trial of the merits, or otherwise, as the Court thinks appropriate.

This designation replaces the designation of 21 March 2007.

DATED this 26th day of March 2007.

s/J.L. Edmondson
J.L. EDMONDSON
Chief of the Eleventh

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Al Rabiee and William H. Whitehead,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of Courts;	)	
Defendant.		

COMPLAINT

Come now Al Rabiee and William H. Whitehead, humbly complaining, and respectfully show unto the Court:

I.

Jurisdiction

1. This court has jurisdiction pursuant to Section 5 of the Voting Rights Act (42 U.S.C. §1973c); 42 U.S.C. § 1983 for injunctive relief, pursuant to 28 U.S.C. §1331, because a federal question is presented; and pursuant to the Declaratory

Judgment Act (28 U.S.C. §2201), because declaratory relief is requested.

II.

Parties

2. The plaintiff, Al Rabiee, is an adult resident of Jefferson County, Alabama.

3. The plaintiff, William H. Whitehead, is an adult resident of Shelby County, Alabama.

4. The defendant, Callie T. Dietz, is the Director of the Alabama Administrative Office of Courts and is sued in her official capacity.

III.

Facts

5. Plaintiffs are resident citizens of the State of Alabama, residing within the Southern Division of the Northern District of Alabama. Plaintiffs are registered to vote in the State of Alabama. Plaintiffs are litigants in the courts of the State of Alabama. During no election cycle have they ever made a campaign contribution in excess of $2,000 to any candidate for the office of circuit judge in the State of Alabama, and have never made a campaign contribution in excess of $4,000 to any candidate for justice of the Supreme Court or for any other appellate court in the State of Alabama.

6. Many lawyers, law firms and litigants who regularly appear in the courts of Alabama have made, and continue to make, political contributions in excess of $4,000 to

candidates for justice and other appellate judgeships in the State of Alabama, and in excess of $2,000 to candidates for circuit judge in the State of Alabama.

7. Code of Alabama (1975), §12-24-1 and 2 ("the Statutes"), provide as follows:

§12-24-1

The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

§12-24-2

(a) Any justice or judge of an appellate or circuit court of the state shall file, at least two weeks prior to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold

further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court with 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b)(2) (c), D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two

thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

8. The Statutes by their terms became effective on January 1, 1996. As of February 13, 2007, neither statute has ever been enforced by any official of the State of Alabama, including Defendant or her predecessors in office. Neither have the Statutes been honored or implemented by the Alabama judicial officers designated therein, except that some judges and justices have filed disclosures of their political contributions with the Secretary of State. On information and belief, no judge or justice has recused himself or herself in response to a demand made under the statute.

9. In particular, the judges and justices who are required by §12-24-2 to perform certain acts have failed or refused to perform them. They take the position, and have made that position known to the Attorney General of Alabama, that §12-24-2 constitutes a practice or procedure that must be submitted by the appropriate official of the State of Alabama to the Attorney General of the United States and by him "pre-cleared" pursuant to 42 U.S.C. §1973c before becoming effective. They further take the position that because §12-24-2 has never been submitted for pre-clearance or otherwise been

pre-cleared, the statute is unenforceable. Accordingly, they have ignored it. The Attorney General of Alabama, who has refused to seek pre-clearance, has taken the position in a case filed in this Court that contrary to the position of the Defendant and the Alabama judges and justices, the Statutes do not require pre-clearance.

If the position of the judges and justices is correct, the Statutes must be pre-cleared if the purposes of Alabama Legislation are to be accomplished, and the Attorney General or other appropriate officer must be required to seek pre-clearance. If, on the other hand, the judges and justices are not correct, and the Statutes are not a practice or procedure that requires pre-clearance under 42 U.S.C. §1973c, the judges, justices, voters and litigants of the State of Alabama, including the Plaintiffs, are entitled to a declaration that pre-clearance is not necessary. Unless one of these results is obtained, the current intolerable situation will continue, and litigants and voters in the State of Alabama will continue to be denied the implementation of a statute, the legality of which has never been challenged except as not pre cleared under the Voting Rights Act.

10. The plaintiffs in this action are parties to pending litigation in Alabama State Courts. Those cases are styled *William H. Whitehead v. Bradley, Arant, Rose & White, LLP, et al.*, CV-2005-6143 (Circuit Court of Jefferson County, Alabama) and *Terry Slaughter v. Al Rabiee, et al.*, CV-2005-7674 (Circuit Court of Jefferson County, Alabama). In this litigation, Plaintiffs have asked that the presiding circuit judges, (the Honorable Tom King and the Honorable Robert Vance, Jr.), recuse themselves because each of these judges received more than $2,000.00 in contributions from the Defendants and their lawyers. The circuit judges denied the Plaintiffs' motions to recuse. In each case, Plaintiffs filed petitions for writ of mandamus to the Alabama Supreme Court,

which denied the petitions. Plaintiff Whitehead filed a motion to recuse the chief justice and associate justices of the Alabama Supreme Court because each had received more than $4,000.00 from Defendants and their lawyer, except for Justice Parker who was not included in the motion to recuse. That motion was denied.

11. In 1995, the Alabama Legislature passed Act Number 95-648 ("the Act"), which was signed into law by the Governor on July 31, 1995. The Act is codified at Alabama Code §§ 12-24-1 and 12-24-2. The Statutes, among other things, require the Alabama Supreme Court to adopt rules requiring attorneys to serve certificates of disclosure stating the amount, if any, of campaign contributions made by the attorneys, their clients, and related parties to the presiding judge (or appellate court judges) during the most recent election campaign. (§ 12-24-2(b). The Alabama Supreme Court has not adopted the rules required by the Statutes. There has been for many years and is now existing a dispute between the United States Department of Justice and the Defendant on the one hand and the Governor and Attorney General of Alabama on the other as to whether Ala. Code 1975, §§ 12-24-1 and 2 are subject to pre-clearance under the Voting Rights Act, 42 U.S.C. § 1973c, before they may be legally enforced. On March 7, 1996, Alabama Attorney General Jeff Sessions submitted the Statutes to the Department of Justice for preclearance under §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. General Sessions described the Statutes as follows:

Act No. 95-648 [the Statutes] was enacted so that all parties in a case and the public will be aware of campaign contributions by the parties in a case to the particular justice or judge. It requires justices and judges on the state appellate and circuit courts to file certain disclosure statements before the commencement of their terms. These statements are in addition to those required by the Alabama Fair Campaign Practices act for candidates. It further requires certain parties

and attorneys to serve disclosure certificates of contributions to any justices or judges sitting on the appellate court where a case is pending in which the attorney or party is involved, is in a trial court proceeding certificates of disclosure contributions to the presiding judge in the case.

12. On May 13, 1996, the Justice Department responded to General Sessions submission. The Justice Department agreed that the Statutes required preclearance giving as a reason that the recusal provision triggered by the reporting requirements would result in lower individual campaign contributions to candidates for judicial election, requiring candidates to seek contributions from a wider range of supporters. The Justice Department reasoned that because of "societal discrimination" black candidates face greater obstacles in securing contributions from the public at large. Therefore, the Justice Department alleged the result would be to make it more difficult for black candidates to run successful campaigns thereby reducing the voting effectiveness of minority voters. On May 20, 1996, General Sessions wrote the Justice Department advising that after "further review" he was convinced that the Statutes did not require preclearance under the 42 USC § 73 c and withdrew the earlier submission of the Statutes for preclearance.

13. On July 23, 1996, the Justice Department responded to this withdrawal of reference for preclearance by insisting that the Statutes did require preclearance, asserting as another reason to that stated above that Canon 7 of the Alabama Canons of Judicial Ethics had been submitted for preclearance which was similar to the Statutes. The Justice Department further stated, "We remind you that unless the State of Alabama receives a declaratory judgment from the United States District Court for the District of Columbia or the Attorney General interposes no objection to the voting change in [the Statutes] they are not legally enforceable."

14. On July 30, 1996, General Sessions responded to the Justice Department ("DOJ") stating that, "the State of Alabama will enforce [the Statutes], and the Attorney General of Alabama will not submit this law for preclearance." General Sessions suggested that if the DOJ disagreed they should take steps to enforce their interpretation of the 42 U.S.C. 1973c with relation to the Statutes.

15. On July 18, 1997, the DOJ responded to General Sessions letter by again insisting that the Statutes be precleared and requesting that the Attorney General reconsider submitting the Statutes for preclearance. The DOJ concluded that, "To enable us to meet our responsibilities to enforce the [Voting Rights Act] please inform us of the action the State of Alabama plans to take concerning this matter."

16. On July 23, 2997, the Attorney General of Alabama, now Judge William Pryor, informed the "DOJ" that the Statutes would not be submitted for preclearance. Judge Pryor closed his letter by stating, "We reiterate that the State of Alabama will enforce [the Statutes]. The Attorney General of Alabama will not submit this law for preclearance because Section 5 does not apply." Judge Pryor further stated that "if you disagree, we again respectfully suggest that you proceed to enforce your interpretation of Section 5 in this context."

17. There is no record of any further correspondence between the DOJ and the Alabama Attorney General regarding preclearance or enforceability of the statutes. Likewise, there is no record of any action taken by the DOJ to enforce its position that the statutes required precelarance. Despite the statements of Sessions and Pryor, the attorney general's office and the governor have never attempted to enforce the statutes.

18. On November 23, 1998, the clerk of the Supreme Court of Alabama, wrote to the judicial inquiry commission a letter stating that the Alabama Supreme Court had not adopted rules implementing § 12-24-2(b). The clerk stated,

"The official reason for this is that the Act has not been precleared by the Justice Department."

19. On January 6, 1999, Frank W. Gregory, the then Director of Courts of the Alabama Administrative Office wrote a letter to the presiding circuit judge of Tuscaloosa County, Alabama, advising that based on the interpretation of the DOJ and the authorities quoted in the DOJ letter of July 18, 1997, "...our office must agree that until this legislation is precleared, it is not legally enforceable and our office will not take any action for non compliance with [the Statutes] provision." (Pls. Ex. 12) This letter shows a carbon copy was sent to Linda K. Oswald, Assistant Attorney General of Alabama, at the address of the Alabama Attorney General in Montgomery, Alabama. Assistant Attorney General Oswald was also the addressee on the DOJ letter of July 18, 1997, a copy of which was attached to the letter to Mr. Gregory.

20. The Alabama Administrative Office of Courts wrote a second letter dated January 11, 1999, to Alabama Circuit Judge L. Scott Coogler (now a United States District Judge for the Northern District of Alabama) informing Judge Coogler that based on the DOJ interpretation and the authorities cited by it "...until this legislation is precleared, it is not legally enforceable and our office will not take any action for non compliance with [the Statutes] provisions." This letter also shows a carbon copy to Assistant Alabama Attorney General Linda Oswald.

21. On March 13, 2000, and June 8, 2000, the Administrative Office of Courts ("AOC") reiterated its opinion to inquiries from Alabama circuit judges that the statutes were not legally enforceable and that AOC would not enforce them or take any action for noncompliance until the Statutes were precleared. Again, carbon copies of these letters were sent to Assistant Attorney General Linda Oswald.

22. Requests for production of documents to the Alabama Attorney General and the AOC have produced no correspondence or relevant documents since the AOC letter of June 8, 2000. Apparently, the matter of the preclearance or enforcement of the Statutes has simply been ignored since that date.

23. There are only two references in the opinions of the Alabama Supreme Court regarding the Statutes. In a concurring opinion in *Finley v. Patterson*, 705 So.2d 834, 835n 1 (Ala. 1997), Justice Cook, quoting a part of the correspondence from the United States Department of Justice to the Alabama Attorney General, wrote as follows:

"I say the enforcement of [the Statutes] is in legal limbo for the following reasons:

(Justice Cook then makes a partial quotation of the correspondence between the DOJ and the Alabama Attorney General).

I am unaware of any information indicating that these differences in opinion and position between the attorney general of Alabama and the United States Department of Justice have been resolved."

24. In addition to the foregoing, Alabama Supreme Court Justice Brown in refusing to recuse herself after a motion for recusal based on the Statutes was filed against her, issued the following opinion asserting that the Justice Department was requiring preclearance before the statutes could be legally enforced:

"Finally, the fact that it is questionable whether §§ 12-24-1 and -2, Ala.Code 1975, which have not yet obtained "preclearance" from the United States Justice Department under the Voting Rights Act of 1965, are even enforceable has been well documented by this Court. See *Ex parte McLeod*, 725 So.2d 271, 274 n. 2 and n. 3 (Ala.1998); *Finley v. Patterson*, 705

So.2d 834, 835-36 n. 1 (Ala.1997)(Cook, J., concurring specially)." (emphasis supplied) *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 234 (Ala. 2004).

IV.
Causes of Action
Count One

25. Plaintiffs seek the appointment of a three-judge court pursuant to 42 U.S.C. § 1973 c(a) and *Allen v. State Board of Elections*, 393 U.S. 544, 563, 89 S.Ct. 817, 830, 22 L.Ed.2d 1 (1969) to issue a declaratory judgment pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2201 that the statutes do not require preclearance under the Voting Rights Act, 42 U.S.C. § 1973, et seq., Plaintiffs pray the Court will grant them attorneys fees and expenses and such other, further, and different relief as the may in the premises be entitled.

Count Two

26. Plaintiff seeks injunctive relief pursuant to 42 U.S.C. § 1983 requiring Defendants to enforce the Statutes because the Statutes do not require preclearance under U.S.C. § 1973c and it is a denial of Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment for the Defendant to fail or refuse to enforce the Statutes which were adopted for the use and benefit of Plaintiffs and those similarly situated. Plaintiffs further pray that the court will grant Plaintiffs' attorneys fees and expenses and such other, further, and different relief as they may in the premises be entitled.

Count Three

27. In the alternative, Plaintiffs pray that if a three judge court is appointed pursuant to 42 U.S.C. § 1973c and concludes that the Statutes do require preclearnce, that the Court will, pursuant to *Lopez v. Montery County*, 519 U.S. 9, 23, 117 S.Ct. 340, 349, 136 L.Ed. 2d. 273 (1996), issue such orders as are necessary to ensure that Alabama submits the Statutes for preclearance as expeditiously as possible, enter

orders granting such temporary remedies that are in the judgment of the Court appropriate, enter an order granting Plaintiffs attorneys fees and expenses and such other, further, and different relief as the may in the premises be entitled.

Respectfully submitted,

s/William Eugene Rutledge
William Eugene Rutledge
ASB-7707-r67w
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PLAINTIFF'S REQUEST TRIAL BY JURY

s/William Eugene Rutledge
William Eugene Rutledge

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DEFENDANT'S ADDRESS:

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Alabama Administrative Office of Courts
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APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AL RABIEE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of Courts,	)	**CASE NO.: 2:07-CV -302- VEH**
	)	
Defendant.	)	

MOTION TO DISMISS

COMES NOW the Defendant, Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts ("AOC"), and, through retained counsel hereby requests that this Court enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief may be granted pursuant to F.R.Civ.P. 12(b)(6), and as grounds therefore states as follows:

1. Plaintiffs complain because Ala. Code 1975, § 12-24-2 (effective with the first election after January 1, 1996) has not been enforced. That section is set out in the Complaint.

2. A simple reading of the complaint reveals that the statute imposes no responsibility or obligation upon the AOC to enforce the statute.

3. Section 6.11, Amendment No. 328, Ala. Const.190 1, ratified December 27, 1973, provides:

> The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These rules may be changed by a general act of statewide application.

By virtue of this amendment, rule-making authority is vested only in the Supreme Court of Alabama. While the Chief Justice has the authority to appoint "an administrative director of courts and other needed personnel to assist him with his administrative tasks," § 6.10, Amend. No. 328, it is the Supreme Court and not the Chief Justice, and clearly not the AOC, which has the authority to promulgate rules.

4. In 1973 Article VI of the Alabama Constitution was amended to provide for a "unified judicial system." Ala.Const. art. VI, § 6.01(a) (Amendment No. 328, ratified Dec. 27, 1973). On October 9, 1975, the Alabama Legislature adopted a measure designed to implement the new judicial article of the Alabama Constitution. Act No. 1205, 1975 Ala.Acts (codified in scattered sections of Ala.Code tit. 12 (1975)). Under this act the Administrative Office of Courts was created. Ala.Code tit. 12, § 12-5-1 (1975). See *Stegmaier v. Trammell*, 597 F.2d 1027 (11th Cir. 1979). However, nowhere in the Alabama Constitution or in

the Code of Alabama[1] has the AOC been granted the authority to promulgate rules governing the disclosure of judicial campaign contributions or rules governing the recusal or disqualification of judges or justices. Such authority is not inherent.

5. In fact, the only responsibility the AOC has in this regard is stated in § 12-24-2(a):

> When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

The Complaint does not allege that the AOC failed to perform this statutory obligation.

6. Under the doctrine of separation of powers, the AOC has no authority of implementation or enforcement of law. "It is the governor whom the people have charged to 'take care that the laws be faithfully executed.' Ala. Const.1901, § 120. '[T]he core power of the legislative branch' is, therefore, the making of laws, while "the core power of the executive branch" is the enforcement of those laws. Opinion of the Justices No. 380, 892 SO.2d 332,335 (Ala.2004)." *McInnish v. Riley*, 925 SO.2d 174, 179 (Ala.,2005).

7. Even if this panel were to find that the complaint has merit, it could not order the AOC to

---

[1] Section 12-5-10 of the Alabama Code prescribes the duties and authorities of the administrative director of the courts.

promulgate any rule of procedure governing finance disclosure.

8. Since, Plaintiffs have only sued "Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts," and since the AOC has no authority, responsibility, obligation or duty to promulgate any rule or enforce any statute, this complaint is due to be dismissed. In the alternative, Dietz requests this Court to dismiss her as a party to this civil action.

WHEREFORE, for these reasons, Defendant respectfully requests that this Court an Order dismissing Plaintiffs' Complaint.

Respectfully submitted,

/s/J. Mark White
J. Mark White (ASB-5029-H66J)
William M. Bowen, Jr. (ASB-1285-E66W)
Gregory H. Hawley (ASB-8552-L69G)
Rebecca G. DePalma (ASB-4105-D57R)

Attorneys for Defendant
Callie T. Dietz, in her official capacity as
Director of the Alabama Administrative
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2007, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to the following *CM/ECF*-participant counsel of record, and I certify that I have mailed a copy of the foregoing by United States Postal Service, properly addressed and postage prepaid, to all non CM/ECF-participant counsel of record:

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/s/ J. Mark White
OF COUNSEL

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Al Rabiee and William H. Whitehead,	)
Plaintiffs,	)
v.	)
Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of Courts,	)
Defendant.	)

NOTICE OF APPEAL

Come now, the plaintiffs Al Rabiee and William H. Whitehead, and pursuant to 42 U.S.C. § 1973c and Rule 18, Rules of Supreme Court appeal to the United States Supreme Court from the final order of the three judge court dated June 8, 2007 dismissing this case.

Respectfully submitted.

s/ William Eugene Rutledge
William Eugene Rutledge
Attorney for Appellants

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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s/ William Eugene Rutledge
Of Counsel

No. 07-375

FILED
OCT 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

AL RABIEE and WILLIAM H. WHITEHEAD,

Appellants,

v.

CALLIE T. DIETZ,
in her official capacity as Director of the
Alabama Administrative Office of the Courts,

Appellee.

On Appeal From A Decision Of A Three-Judge District Court For The Northern District Of Alabama

APPELLEE'S MOTION TO AFFIRM OR DISMISS

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QUESTION PRESENTED

The question presented in this case is whether the director and administrative head of the Alabama Administrative Office of Courts may be compelled to either submit a state statute for judicial preclearance under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(c), or whether she may be compelled to enforce Ala. Code § 12-24-2 requiring the recusal/disqualification of a state judge in cases where the judge has received significant financial contributions from a party, attorney or individual connected with the case.

PARTIES TO THE PROCEEDING

Al Rabiee is an individual person, was one of the two plaintiffs in district court, and is one of the appellants on this appeal.

William H. Whitehead is an individual person, was one of the two plaintiffs in district court, and is one of the appellants on this appeal.

For purposes of clarity, Rabiee and Whitehead are referred to as "Rabiee" in this brief.

Callie T. Dietz ["Dietz"] is an individual person and Director of the Alabama Administrative Office of the Courts [the "AOC"]. She was the defendant in the district court and is the appellee on this appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26 of the Rules of the Supreme Court appellee Dietz hereby states that neither she nor the Alabama Administrative Office of Courts has any parent company, and no public company owns 10% or more of its stock.

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OPINION BELOW

The memorandum opinion of the three-judge district court in *Al Rabiee, et al. v. Callie T. Dietz*, Case No. 2:07-CV-302, United States District Court for the Northern District of Alabama, Southern Division, entered June 8, 2007, ("Panel Opinion") is unreported. A copy of this opinion is contained in Appendix A of this brief.

STATEMENT OF JURISDICTION

The three-judge district court panel entered its Memorandum Opinion granting Dietz's Motion to Dismiss Rabiee's complaint for declaratory judgment on June 8, 2007. Rabiee filed a notice of appeal on June 22, 2007. This Court has jurisdiction pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

STATUTES INVOLVED

The federal and state statutes involved are set out in Rabiee's Jurisdictional Statement at pp. 1 through 12. The principal statute involved is Ala. Code § 12-24-1 and § 12-24-2:

Code of Alabama

Title 12. Courts.

Chapter 24. Disclosure of Campaign Contributions.

§ 12-24-1. Recusal of justice or judge due to campaign contributions.

The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

§ 12-24-2. Filing by judges, justices, parties, and attorneys of disclosure statements concerning campaign contributions.

(a) Any justice or judge of an appellate or circuit court of this state shall file, at least two weeks prior to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of

State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court within 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any

employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b)(2)(C, D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of

recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

STATEMENT OF THE CASE

Rabiee seeks to compel Callie T. Dietz (Dietz) as director of the AOC to enforce a state statute requiring the recusal/disqualification of a state judge if that judge has received significant financial contributions from a party, attorney or individual connected with the case. Dietz is only the head of Alabama's Administrative Office of Courts ("AOC"). Neither she nor the AOC have any law enforcement or rule making authority under any statute or law.

On January 1, 1996, Alabama's judicial "Disclosure of Campaign Contributions" law became effective. *See* Acts 1995, No. 95-648, p. 1355, § 2(c)c codified as Ala. Code §§ 12-24-1 and -2 (the "Alabama Statute"). The Alabama Statute is designed to require the recusal of a judge from hearing a case in which the judge received a "substantial contribution" from a party, attorney or individual connected with the case. Ala. Code. § 12-24-1. The Statute requires, *inter alia*: (a) all Alabama state court judges to file with the Secretary of State annual public statements disclosing campaign contributions; (b) the Alabama Supreme Court to promulgate rules of court requiring attorneys to serve on all counsel of record in each case

certificates of disclosure stating the amount, if any, of campaign contributions made to the most recent election campaign of the presiding judge by all attorneys of record, any attorney with whom they practice, their clients, and related parties; and (c) upon the filing of a written notice of recusal, Alabama state court judges to recuse from any case in which the attorneys, their clients, or the related parties contributed over a certain amount of money to the judge's campaigns. *See* Ala. Code § 12-24-2. If a judge fails to file a campaign disclosure statement, the Alabama Secretary of State "shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section." Ala. Code § 12-24-2(a).

The Alabama Statute has not been submitted or precleared by the Justice Department. Alabama is a "covered" state under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(c), and must obtain judicial "preclearance" before enacting or seeking to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . " 42 U.S.C. §§ 1973b, 1973(c)(a); *Lopez v. Monterey County, CA*, 519 U.S. 9, 12 (1996).

It is undisputed that the Alabama Statute has never been enforced. The Alabama Attorney General has never taken steps to enforce the Statute taking the position that the Statute does not require

preclearance.[1] The Alabama Supreme Court has never promulgated rules as required by the statute, having taken the position that, pursuant to Section 5 of the Voting Rights Act, the Statute is not legally enforceable until it has been precleared.[2] The Alabama Secretary of State has never notified AOC that a judge has failed to file an annual disclosure statement. The Alabama Administrative Office of Courts ("AOC") and its Director Dietz have likewise taken

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[1] The Department of Justice has taken the position that the Alabama Statute requires preclearance. In 1996 and 1997, two succeeding Alabama Attorney Generals (Jeff Sessions now U.S. Senator Sessions, and William Pryor now Judge Pryor of the U.S. Circuit Court of Appeals for the Eleventh Circuit) took the position that preclearance was not required because Section 5 was not involved. *See Presley v. Etowah, County Commission*, 502 U.S. 491, 510 (1992). Each refused to submit the Statute for preclearance.

[2] In *Rabiee v. Dietz*, Case No. 2:07-CV-302, N.D. Ala, June 8, 2007, the three-judge panel referred to *Ex parte McLeod*, 725 So.2d 271, 274 n. 3 (Ala. 1998) (noting that "preclearance of [the Statute] by the United States Justice Department is still pending" and stating that "it would be futile for this court to impose on judges a duty to disclose contributions when, upon the Justice Department's approval of the new statute, that duty will shift to the contributing parties."); *see also Finley v. Patterson*, 705 So.2d 834, 835 n. 1 (Ala. 1997) (Cook, J., specially concurring, noting that the enforcement of the Alabama Statutes "is in legal limbo" because there has been no resolution to the dispute between the Alabama Attorney General and the DOJ); *Bracking v. Trimmier Law Firm*, 897 So.2d 207, 233-34 (Ala. 2004) (Brown, J., denying a motion to recuse under the Alabama Statute, stating that because the Statute has not obtained preclearance, "it is questionable whether [it is] even enforceable," citing *Ex parte McLeod*, and *Finley*).

the position that the Alabama Statute requires preclearance under Section 5 of the VRA.

Rabiee had litigation pending in Alabama State Courts in which he filed motions to recuse based on allegations that the presiding judge(s) had received a "substantial contribution" from a party, attorney or individual connected with the case(s). Those recusal motions were denied at the state trial level. The Alabama Supreme Court denied relief on related petitions for writs of mandamus.

Rabiee contends that the failure or refusal to enforce the Alabama Statute is a violation of his right, and the rights of those similarly situated, under the Due Process Clause of the Fourteenth Amendment. Rabiee seeks to enforce Section 5 of the VRA. Initially, Rabiee filed an action in federal court in July of 2006, against the Governor Robert Riley and Attorney General Troy King on virtually identical grounds to those involved here. *Rabiee et al v. Riley et al.*, 2:06-cv-01395-RDP, (N.D. Ala. 2006), Memorandum Opinion and Order entered February 6, 2007. There a three-judge panel dismissed Rabiee's case without prejudice. In that case, Rabiee requested a declaratory judgment that the Alabama Statute did require preclearance. However, he abandoned that position in his trial brief, and argued that the Alabama Statute does not need to be precleared. Both the Alabama Attorney General and the Governor maintained their original position that the Alabama Statute did not require Section 5 preclearance. Because the position plaintiff Rabiee stated in his trial

brief was no different from that of the defendants, the panel determined that no "case" or "controversy" existed as is required for federal court jurisdiction under Article III of the United States Constitution. *See* U.S. Const. Art. III, § 2, cl. 1; *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). Likewise, the Declaratory Judgment Act applies only in cases involving an "actual controversy." 28 U.S.C. § 2201. Consequently, Rabiee's complaint was dismissed.

After the dismissal, Rabiee filed this civil action for declaratory judgment pursuant to 28 U.S.C. § 2201. This time Rabiee named Dietz in her official capacity as Director of the AOC as the only defendant. Rabiee asserted claims under Section 8 of the Voting Rights act, 42 U.S.C. § 1973c and the Due Process Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. § 1983, maintaining that the Alabama Statute does not require preclearance. The three-judge panel again dismissed Rabiee's case finding that he had once again failed to meet the "case or controversy" requirement of Article III and the Declaratory Judgment Act.

In his second complaint, the one about which is the subject of this appeal, Rabiee sought alternative grounds of relief. If the Panel found that the Alabama Statute did not require preclearance, Rabiee requested a declaratory judgment to that effect and an injunction directing Dietz to enforce the Alabama Statute. In the alternative, and if the Panel decided that the Alabama Statute did require preclearance, Rabiee requested the Panel to "issue such orders as

are necessary to ensure that Alabama submits the Statutes for preclearance," pursuant to *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). Dietz moved to dismiss Rabiee's Complaint on the grounds that she was not a proper defendant because neither she nor the AOC has the authority to enforce the Alabama Statute.

The three-judge panel dismissed Rabiee's complaint on the ground that Rabiee had failed to establish standing as defined in *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Rabiee had failed to demonstrate: (a) that he had suffered an injury in fact, (b) that there was a causal connection between that injury and the challenged action of Dietz, and (c) that it must be likely, rather than merely speculative, that a favorable judgment would redress Rabiee's injury.

SUMMARY OF THE ARGUMENT

The federal district court panel correctly dismissed Rabiee's action for declaratory judgment and held that Rabiee had failed to demonstrate: (a) that he had suffered an injury in fact, (b) that there was a causal connection between that injury and the challenged action of Dietz, and (c) that it must be likely, rather than merely speculative, that a favorable judgment would redress Rabiee's injury.

ARGUMENT

On direct appeal from the decision of the three-judge panel to this Court, Rabiee argues that the panel's decision is "wrong" for two reasons. First, the panel erroneously denied Rabiee's standing because "that decision depends on the district court's erroneous analysis of Defendant's role in enforcing the Statutes." Rabiee's Jurisdictional Statement at 21. Rabiee argues that Dietz has a "duty to enforce the statute" because the AOC, like the Alabama Governor and Attorney General, has taken the position that the statute does not require preclearance. *Id.* This argument in no way overcomes the Panel's finding that the AOC has no obligation or authority to enforce this statute and has no obligation or authority to submit this statute for preclearance.

In these regards, the Panel found that the last sentence of Ala. Code § 12-24-2(a) does provide that "[w]hen a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section." This is the only reference to the AOC contained in the entire statute.

> Plaintiffs would have the panel interpret this provision as giving the AOC the broad authority to enforce all provisions of the Statute. However, as Defendant points out, the AOC's duty to withhold a justice's or judge's

compensation is triggered only by notification from the Secretary of State of a justice's or judge's non-compliance with Subsection (a)'s disclosure requirements. The AOC is the proper agency for this duty, as it is responsible for the payment of justice's and judge's salaries. See Ala. Code § 12-5-13(b). The AOC may have a great deal of discretion with regard to expenditure of funds for the courts generally, however, under the Statute, it has no discretion. Its duty is purely ministerial. The Statute does not give the AOC discretion to determine whether a justice or judge has complied with the disclosure requirements set out in Subsection (a), or if that justice's or judge's compensation is to be suspended. The discretion to make those decisions is vested explicitly in the Secretary of State. The AOC's sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the Statute, the AOC has no duty or authority thereunder whatsoever.

More importantly, Plaintiffs do not allege any injury caused by the nonenforcement of the disclosure requirements of Subsection (a). They have attempted to assert their rights under Subsection (c), which sets out the circumstances under which parties have the right to require the recusal of the justice or judge presiding over their case. The injury Plaintiffs allege as a result of the

non-enforcement of the Statute, is the denial of their motions for recusal of their state court judges.[3] Subsection (c) does not explicitly impose any responsibility for its enforcement upon the AOC, and Plaintiffs do not contend that it does.

Likewise, we are aware of no authority under which the AOC is charged with the duty of submitting a newly enacted law to the DOJ for preclearance under Section 5 of the VRA. Should the panel determine that the Alabama Statute does require preclearance, the remedy Plaintiffs request is for the court to "issue such orders as are necessary to ensure that Alabama submits the Statute[] for preclearance as expeditiously as possible . . . " (Doc. 1, Compl. at 14, ¶ 27.) As is apparent from the history of the Alabama Statute as summarized above, the submission of new statutes for preclearance under Section 5 of the VRA is the duty of the Attorney General of Alabama. Moreover, the determination of whether to submit a particular statute for preclearance is within his discretion.

Because Dietz is not the state official charged with the duty of enforcing the Statute or submitting the Statute for preclearance, any injury allegedly caused by the failure to do so is not "fairly traceable" to any

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[3] The traditional relief for the denial of a motion to recuse is a motion for a new trial under Ala. R. Civ. P. 59 or 60.

> action of Dietz or the AOC. Rather, any such injury is the result of inaction of third parties not before this panel: the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. Injury suffered at the hands of these third parties, "is insufficient by itself to establish a case or controversy in the context of this suit," for neither has been named as a defendant. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976). Under the circumstances, Plaintiffs have failed to meet the causation prong of the standing analysis.

Panel Opinion at 15-16 (Rabiee's Jurisdictional Statement, Appendix A).

Second, Rabiee argues that the Panel also erred in concluding that any injury suffered was "caused by the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama" and not by the AOC. Rabiee's Jurisdictional Statement at 21 quoting from the Panel Opinion. This is the same argument as the first but merely worded in a different manner. The statute places no duty of enforcement or submission for preclearance upon the AOC. Panel Opinion at 12 (Rabiee's Jurisdictional Statement, Appendix A). Under the statute, the AOC's "sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the

Statute, the AOC has no duty or authority thereunder whatsoever." Panel Opinion at 15 (Rabiee's Jurisdictional Statement, Appendix A).

CONCLUSION

Rabiee has argued nothing which was not considered by the Panel. He merely disagrees with the Panel's reasoning and Opinion without the citation of any authority to the contrary and without stating that the Panel overlooked or misapprehended a point of law or fact and then explaining why this is so. This appeal is wholly insubstantial and devoid of merit. Rabiee's appeal is frivolous in that it not only lacks merit but in that the claim is also "'without a plausible legal or factual basis and lacking in justification.' *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226-27 (7th Cir. 1984)." *Amlong & Amlong, P.A. v. Denny's, Inc.*, No. 04-14499, 2006 WL 4758983 (11th Cir., September 17, 2006). For these reasons, this appeal is due to be dismissed and/or the judgment of the Panel affirmed.

Respectfully submitted,

WILLIAM M. BOWEN, JR.
Counsel of Record
J. MARK WHITE
Attorneys for Callie T. Dietz

APPENDIX A

Al Rabiee, et al. v. Callie T. Dietz, Case No. 2:07-CV-302, United States District Court for the Northern District of Alabama, Southern Division, three-judge panel memorandum opinion, June 8, 2007.

FILED
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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AL RABIEE, et al.,	**CASE NO.:**
Plaintiffs,	**2:07-CV-302-VEH**
v.	**GERALD BARD TJOFLAT U.S. Circuit Judge**
CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of Courts,	**SHARON LOVELACE BLACKBURN U.S. Chief District Judge**
Defendant.	**VIRGINIA EMERSON HOPKINS U.S. District Judge**

MEMORANDUM OPINION

PER CURIUM:

This case is currently before the court on the Motion to Dismiss filed by defendant Callie T. Dietz

("Dietz"). (Doc. 13.)[1] Upon consideration of the record, the submissions of the parties, and the relevant law, the panel is of the opinion that the Motion is due to be granted.

I. INTRODUCTION

Plaintiffs Al Rabiee and William H. Whitehead initiated this declaratory judgment action pursuant to 28 U.S.C. § 2201, against Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts. Plaintiffs assert [PAGE 2] claims under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, and under the Due Process Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. § 1983.

Section 5 of the VRA governs changes in voting procedures, with the purpose of preventing jurisdictions covered by its requirements from enacting or seeking to administer voting changes that have a purpose or effect of denying or abridging the right to vote on account of race or color. *Lopez v. Monterey County, CA*, 519 U.S. 9, 12 (1996). Pursuant to Section 5, as a "covered jurisdiction," Alabama must obtain judicial preclearance from the United States District Court for the District of Columbia, or administrative preclearance from the United States

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[1] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

Attorney General, before enacting or seeking to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . " 42 U.S.C. §§ 1973b, 1973c(a). "To obtain administrative preclearance of a new law affecting voting, a covered jurisdiction must submit the new law to the Attorney General of the United States. If the Attorney General does not object within 60 days of submission, the jurisdiction may enforce the legislation." Lopez, 519 U.S. at 12. Private citizens may bring suit to enforce Section 5, which "shall be heard and determined by a [district court] of three judges . . . " 42 U.S.C. § 1973c(a).

A. Summary of Plaintiffs' Claims

Plaintiffs' Complaint concerns an Alabama statute codified at Ala. Code §§ 12-24-1, 12-24-2 (the "Alabama Statute"), and contains four counts. Count One seeks appointment of a three-judge panel and declaratory judgment that the Alabama Statute does not require Section 5 preclearance. (Doc. 1, Compl. ¶ 25.) Count Two seeks injunctive relief under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment requiring Dietz to enforce the statute. (Doc. 1, Compl. ¶ 26.) Counts Three and Four contain alternative remedies in the event that the panel concludes that the Statute does require

preclearance.[2] Count Three seeks declaratory judgment that the Statute requires Section 5 preclearance. (Doc. 1, Compl. ¶ 27.) Count Four requests the panel to issue any and all orders necessary to compel the state of Alabama to submit the statute for preclearance. (Doc. 1, Compl. ¶ 27.)

B. History of the Alabama Statute

The Alabama Statute was signed into law as Act No. 95-648, Ala. Acts 1995, on July 31, 1995; effective beginning with the first election after January 1, 1996. It was intended "to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate, the justice or judge received a substantial contribution" from a party in the case, attorneys for the party, or certain other individuals. Ala Code. § 12-24-1. Under the Statute, a contribution of more than four thousand dollars ($4,000) to the campaign of a justice or judge of an appellate court, or a contribution of more than two thousand dollars ($2,000) to the campaign of a circuit judge, is considered a "substantial contribution." See Ala. Code § 12-24-2(c). The Statute requires, inter alia: (1) all Alabama state court justices and judges to file with the Secretary of State annual public statements disclosing campaign

[2] The third and fourth counts in 2 Plaintiffs' Complaint are both labeled Count Three. The panel will assume that this is a mistake by Plaintiffs' counsel and will refer to the final count as Count Four.

contributions; (2) the Alabama Supreme Court to promulgate rules of court requiring attorneys to serve on all counsel of record in each case certificates of disclosure stating the amount, if any, of campaign contributions made to the most recent election campaign of the presiding justice or judge by all attorneys of record, any attorney with whom they practice, their clients, and related parties; and (3) upon the filing of a written notice of recusal, Alabama state court justices and judges to recuse from any case in which the attorneys, their clients, or the related parties contributed over a certain amount of money to the judge's campaigns. See Ala. Code § 12-24-2.

In March 1996, then Alabama Attorney General Jeff Sessions submitted the Alabama Statute to the United States Department of Justice ("DOJ") for preclearance under Section 5 of the Voting Rights Act. On May 13, 1996, the DOJ responded, [PAGE 5] requesting additional information from the Attorney General including, inter alia: the rule or rules adopted by the Alabama Supreme Court pursuant to the Statute; a list of each campaign contribution for each successful candidate for each Alabama justice and judge position since 1989; and a description of each instance since 1989 in which a party to litigation in the Alabama courts had sought recusal based on a judicial campaign contribution. The DOJ agreed that the Statute required preclearance, reasoning that the recusal provision triggered by the reporting requirements would result in lower individual campaign contributions to candidates for judicial election,

requiring candidates to seek contributions from a wider range of supporters. According to the DOJ, because of "societal discrimination," black candidates face greater obstacles in securing contributions from the public at large. Therefore, the DOJ concluded that enforcement of the Alabama Statute would make it more difficult for black candidates to run successful campaigns, thereby reducing the voting effectiveness of minority voters.

Attorney General Sessions responded on May 20, 1996, by withdrawing the Statute from submission, asserting that, after further review, his office had determined that it does not require preclearance because it does not "bear a direct relation on voting itself." The Alabama Attorney General's position relied on *Presley v. Etowah County Commission*, 502 U.S. 491, 510 (1992). The DOJ responded on July 23, [PAGE 6] 1996, expressing its disagreement with the Attorney General's reasoning, and requesting that the Statute be re-submitted for preclearance review. The Attorney General responded by letter dated July 30, 1996, stating, *inter alia*: "The State of Alabama will enforce Act No. 95-648, and the Attorney General of Alabama will not submit this law for preclearance. Section 5 does not apply. If you disagree, we respectfully suggest that you proceed to enforce your interpretation of Section 5 in this context." Almost one year later, in a letter to the Alabama Attorney General dated July 18, 1997, the DOJ again insisted that the Statute be submitted for preclearance. The DOJ requested that the Attorney General "inform us of the

action the State of Alabama plans to take concerning this matter." The new Alabama Attorney General, now Judge William Pryor, responded on July 23, 1997, by informing the DOJ that the Statutes would not be submitted for preclearance because, in his opinion, Section 5 does not apply. There is no record of further correspondence between the Alabama Attorney General and the DOJ regarding the preclearance of the Alabama Statute.

The Attorney General has never taken steps to enforce the Statute. Moreover, the Alabama Supreme Court has never promulgated rules as required by the statute, taking the position that, pursuant to Section 5 of the Voting Rights Act, the Statute is not legally enforceable until it has been precleared by the Attorney General or the [PAGE 7] United States District Court for the District of Columbia. On November 23, 1998, the Clerk of the Supreme Court of Alabama stated by letter to the judicial inquiry commission that "the official reason" for the Supreme Court's failure to adopt rules implementing Ala. Code § 12-24-2(b) was because "the Act had not been precleared by the Justice Department." The Alabama Supreme Court has also indicated its position, directly and indirectly, in several opinions. *Ex parte McLeod*, 725 So.2d 271, 274 n.3 (Ala. 1998) (noting that "preclearance of [the Statute] by the United States Justice Department is still pending" and stating that "it would be futile for this court to impose on judges a duty to disclose contributions when, upon the Justice Department's approval of the new statute, that duty

will shift to the contributing parties."); see also *Finley v. Patterson*, 705 So.2d 834, 835 n. 1 (Ala. 1997) (Cook, J., specially concurring, noting that the enforcement of the Alabama Statutes "is in legal limbo" because there has been no resolution to the dispute between the Alabama Attorney General and the DOJ); *Bracking v. Trimmier Law Firm*, 897 So. 2d 207, 233-34 (Ala. 2004) (Brown, J., denying a motion to recuse under the Alabama Statute, stating that because the Statute has not obtained preclearance, "it is questionable whether [it is] even enforceable," citing *Ex parte McLeod*, and *Finley*).

The Alabama Administrative Office of Courts ("AOC"), and presumably its Director, defendant Dietz, have likewise taken the position that the Alabama Statute [PAGE 8] requires preclearance under Section 5 of the VRA. On January 6, 1999, Frank W. Gregory, then-Director of the AOC, wrote a letter to the presiding circuit judge of Tuscaloosa County advising that, in light of the DOJ's position as stated in its July 18, 1997 letter, "our office will not take any further action for non compliance with [the Statute's] provision[s]." The AOC reiterated its position to other Alabama Circuit Judges in letters dated January 11, 1999, March 13, 2000, and June 8, 2000. It appears that the last correspondence on this issue was the AOC's June 8, 2000 letter.

Plaintiffs contend that the Statute was adopted for their use and benefit and the use and benefit of those similarly situated and, therefore, the failure or refusal to enforce the Alabama Statute is a violation

of their rights under the Due Process Clause of the Fourteenth Amendment. Both Plaintiffs are parties in litigation currently pending in Alabama state court.[3] Both have moved for the recusal of the presiding judges in their respective cases pursuant to the terms of the Alabama Statute. Plaintiffs contend that each judge has received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would [PAGE 9] require recusal under Ala. Code. § 12-24-2(c). Their motions to recuse were denied. Both Plaintiffs filed petitions for a writ of mandamus to the Alabama Supreme Court. Plaintiff Whitehead also filed a motion to recuse all but one of the Justices of the Supreme Court on consideration of his petition on the ground that each had received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would require the Justices' recusal under the Statute. The Supreme Court denied Whitehead's motion to recuse, as well as both Plaintiffs' petitions for mandamus.

C. Plaintiffs' Previous Action

Plaintiffs Rabiee and Whitehead filed a similar action in this court on July 20, 2006 against Governor

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[3] Plaintiffs' cases are styled: *William H. Whitehead v. Bradley, Arant, Rose & White, LLP, et al.*, CV-2005-6143 (Circuit Court of Jefferson County, Alabama; Hon. Tom King presiding); *Terry Slaughter v. Al Rabiee, et al.*, CV-2005-7674 (Circuit Court of Jefferson County, Alabama; Hon. Robert Vance, Jr. presiding).

Robert Riley and Attorney General Troy King on virtually identical grounds. CV-06-1395-RDP. A three-judge panel convened in that case included U.S. Circuit Judge Frank M. Hull, and U.S. District Judges David R. Proctor and Virginia Emerson Hopkins. In their complaint, Plaintiffs requested a declaratory judgment that Ala. Code §§ 12-24-1, 12-24-2 *do* require preclearance under Section 5 of the VRA. However, in their trial brief, Plaintiffs abandoned their original position, and argued that the Alabama Statute *does not* need to be precleared. As noted above, the Alabama Attorney General has maintained his position that the Alabama Statute does not require Section 5 preclearance. Governor Riley also took [PAGE 10] that position. Because the position Plaintiffs stated in their trial brief mirrored that of the defendants, the panel determined that no "case" or "controversy" existed as is required for federal court jurisdiction under Article III of the United States Constitution.[4] Plaintiffs' complaint was dismissed.

Plaintiffs filed this action against the Director of the AOC in her official capacity. Here, Plaintiffs have taken the position they eventually reached in their previous action, that the Alabama Statute does not

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[4] Article III of the Constitution re 4 stricts the jurisdiction of federal courts to actual "cases" or "controversies." U.S. Const. Art. III, § 2, cl. 1; *see Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). Likewise, the Declaratory Judgment Act applies only in cases involving an "actual controversy." 28 U.S.C. § 2201.

require preclearance. Plaintiffs have thus avoided the particular Article III problem they faced in their former action, as the AOC's position on the issue of preclearance of the Alabama Statute is directly adverse to Plaintiffs' position. However, Plaintiffs again fail to meet the "case or controversy" requirement of Article III and the Declaratory Judgment Act.

II. DISCUSSION

Plaintiffs request relief in the form of two alternative schemes. Primarily, they seek a declaratory judgment that the Alabama Statute does *not* require preclearance, and they ask for an injunction under 42 U.S.C. § 1983 ordering Dietz to enforce the statutes. As an alternative, should the court declare that preclearance *is* required, [PAGE 11] Plaintiffs ask the court "to issue such orders as are necessary to ensure that Alabama submits the Statutes for preclearance," pursuant to *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (holding that the goal of a three-judge panel facing a challenge under Section 5 must be to ensure that the covered jurisdiction submits the challenged legislation to the appropriate federal authorities for preclearance as expeditiously as possible). Dietz moves the court to dismiss Plaintiffs' Complaint on the grounds that she is not a proper defendant in this

action because neither she nor the AOC have the authority to enforce the Alabama Statute.[5]

Although the question of standing is not addressed in the parties' briefs, "the federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1990) (internal quotations omitted; alterations in original)). Any plaintiff seeking to invoke a federal court's jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "If a plaintiff lacks standing, the 'case' or 'controversy' requirement of Article III, § 2 of the U.S. Constitution is not satisfied, and the case must be dismissed." *Koziara v.* [PAGE 12] *City of Casselberry*, 392 F.3d 1302, 1304 (11th Cir. 2004). The "irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must be able to show that he has suffered an injury in fact – an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between that injury and the challenged action of the defendant –

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[5] Defendant also contends that she is shielded from Plaintiffs' claims by Eleventh Amendment immunity. Because the panel finds that Plaintiffs' Complaint fails on the threshold issue of standing, it will not reach the issue of Dietz's immunity.

the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. *Id.* Finally, it must be likely, rather than merely speculative, that a favorable judgment will redress the plaintiff's injury. *Id.* at 561.

Plaintiffs' alleged injury is the denial of their right under Ala. Code § 12-24-2(c) to require the recusal of their presiding Alabama circuit judges, each of whom Plaintiffs allege received more than $2,000 from Plaintiffs' opposing parties and/or the opposing parties' lawyers. Plaintiff Whitehead also alleges the denial of his right to require the recusal of certain justices of the Alabama Supreme Court on consideration of his petition for writ of mandamus, each of whom Plaintiffs allege have received more than $4,000 from Plaintiff Whitehead's opposing party and/or the opposing party's lawyers. The actions Plaintiffs challenge, therefore, appear to be the denial of their motions to recuse by the Alabama circuit judges and certain justices [PAGE 13] of the Alabama Supreme Court which, in turn, was caused by one of two things. If the Statute does not require preclearance, the injury was caused by the failure to enforce the Statute; however, if the Statute does require preclearance, the injury was caused by the failure to submit the Statute for preclearance so that it could then be enforced. For the purposes of the standing inquiry, the panel will assume, without deciding, that Plaintiffs have alleged an injury in fact. That injury however, is caused by factors independent of

Dietz, and thus cannot be redressed by declaratory or injunctive relief against her.

Under United States Supreme Court and Eleventh Circuit precedent, "when a plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998); see also *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant); *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Although Plaintiffs in this case are not seeking a declaration as to the constitutionality of a state law, we believe that the above stated principal nonetheless applies. In order to be a proper defendant [PAGE 14] in this case, a state official must be charged with the duty of enforcing the Statute at issue, and/or with the duty of submitting new laws affecting voting rights to the DOJ for preclearance under Section 5 of the VRA. Unless Defendant Dietz has the requisite authority, this panel's determination of Plaintiffs' claims would amount to nothing more than an advisory opinion prohibited by Article III's case and controversy requirement. See *Church v. City of Huntsville*, 30 F.3d 1332, 1335 (11th Cir. 1994) (citing *Valley Forge Christian College v. Americans United for Separation of*

Church and State, 454 U.S. 464, 471-72 (1982)). We can find no Alabama law or rule of any kind bestowing upon the AOC the general authority to enforce any law or to submit new enactments for Section 5 preclearance. Plaintiffs contend that, in the last sentence of Subsection (a), the Alabama Statute explicitly imposes responsibility for its enforcement upon the AOC. The Alabama Statute provides, in pertinent part, as follows:

> (a) any justice or judge of an appellate or circuit court of this state shall file
>
> . . . with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office
>
> . . . . When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.
>
> (b) The Supreme Court [of Alabama] shall provide . . . a rule or rules . . . as follows: In an appellate court proceeding the attorneys for all parties [PAGE 15] shall serve certificates of disclosure on all attorneys of record . . . Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case

> is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case . . . [T]he court may impose sanctions provided for by Rule 37(b)(2)(C), (D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.
>
> (c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount . . . below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge, or else such party shall be deemed to have waived such right of recusal . . .

Ala. Code § 12-24-2 (emphasis added). The sentence to which Plaintiffs refer does impose an obligation upon the AOC to withhold compensation from justices and judges who have failed to comply with the

disclosure requirements set out in Subsection (a). Plaintiffs would have the panel interpret this provision as giving the AOC the broad authority to enforce all provisions of the Statute. However, as Defendant points out, the AOC's duty to withhold a justice's or judge's compensation [PAGE 16] non-compliance with Subsection (a)'s disclosure requirements. The AOC is the proper agency for this duty, as it is responsible for the payment of justice's and judge's salaries. See Ala. Code § 12-5-13(b). The AOC may have a great deal of discretion with regard to expenditure of funds for the courts generally, however, under the Statute, it has no discretion. Its duty is purely ministerial. The Statute does not give the AOC discretion to determine whether a justice or judge has complied with the disclosure requirements set out in Subsection (a), or if that justice's or judge's compensation is to be suspended. The discretion to make those decisions is vested explicitly in the Secretary of State. The AOC's sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the Statute, the AOC has no duty or authority thereunder whatsoever.

More importantly, Plaintiffs do not allege any injury caused by the nonenforcement of the disclosure requirements of Subsection (a). They have attempted to assert their rights under Subsection (c), which sets out the circumstances under which parties have the right to require the recusal of the justice or judge

presiding over their case. The injury Plaintiffs allege as a result of the non-enforcement of the [PAGE 17] Statute, is the denial of their motions for recusal of their state court judges.[6] Subsection (c) does not explicitly impose any responsibility for its enforcement upon the AOC, and Plaintiffs do not contend that it does.

Likewise, we are aware of no authority under which the AOC is charged with the duty of submitting a newly enacted law to the DOJ for preclearance under Section 5 of the VRA. Should the panel determine that the Alabama Statute *does* require preclearance, the remedy Plaintiffs request is for the court to "issue such orders as are necessary to ensure that Alabama submits the Statute[] for preclearance as expeditiously as possible . . . " (Doc. 1, Compl. at 14, ¶ 27.) As is apparent from the history of the Alabama Statute as summarized above, the submission of new statutes for preclearance under Section 5 of the VRA is the duty of the Attorney General of Alabama. Moreover, the determination of whether to submit a particular statute for preclearance is within his discretion.

Because Dietz is not the state official charged with the duty of enforcing the Statute or submitting the Statute for preclearance, any injury allegedly caused by the failure to do so is not "fairly traceable"

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[6] The traditional relief for the denial of a motion to recuse is a motion for a new trial under Ala. R. Civ. P. 59 or 60.

to any action of Dietz or the AOC. Rather, any such injury is the result of inaction of third parties not before this panel: the [PAGE 18] Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. Injury suffered at the hands of these third parties, "is insufficient by itself to establish a case or controversy in the context of this suit," for neither has been named as a defendant. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Under the circumstances, Plaintiffs have failed to meet the causation prong of the standing analysis.

For much the same reasons as outlined above, Plaintiffs cannot meet the third component of the standing inquiry – redressability. The Supreme Court has explained redressability as follows: In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). "Absent a redressable injury a judicial

determination of plaintiff's claim would amount to an advisory opinion prohibited by Article III's case and controversy requirement." *Church*, 30 F.3d at 1335. The alternative remedies Plaintiffs seek – an injunction [PAGE 19] requiring the enforcement of the Alabama Statute, or an appropriate order to ensure that Alabama submits the Statute for preclearance – cannot be redressed by the AOC because it does not have the power to take either action. No remedy handed down against the Dietz or AOC could abate Plaintiffs' alleged injury. Thus, Dietz is not a proper defendant to this matter, and no "case or controversy" within the scope of Article III exists. Dietz's Motion to Dismiss is due to be granted.

III. CONCLUSION

Based on the forgoing, the panel concludes that Defendant's Motion to Dismiss is due to be granted. An Order granting Dietz's Motion and dismissing Plaintiffs' case will be entered contemporaneously herewith.

DONE and ORDERED this the 8th day of June, 2007.

VIRGINIA EMERSON HOPKINS
United States District Judge

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SUPREME COURT, U.S.

(3)

No. 07-375

In The Supreme Court of the United States

AL RABIEE and WILLIAM H. WHITEHEAD,
Appellants,

v.

CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of the Courts,
Appellee.

On Appeal from the Decision of a Three Judge District Court for the Northern District of Alabama Appointed Pursuant to 42 U.S.C. § 1973c

RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM OR DISMISS

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ARGUMENT

I.

INTRODUCTION

The Defendant-Appellee, Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts ("AOC"), has replied to Appellants' Jurisdictional Statement ("AJS") by moving to affirm the district court decision ("Opinion") or to dismiss this appeal ("Motion") on the following grounds: (1) Appellants argue only that the district court was wrong in its decision without showing why the district court was wrong; (2) the appeal is frivolous; and (3) the appeal raises nothing new not presented to the district court. (Motion at 15).

The extent of AOC's misunderstanding of this appeal is shown by the AOC's statement of the question presented. AOC states the question as whether AOC may be compelled to submit a state statute for preclearance under 42 U.S.C. § 1973c or to enforce *Ala.Code*, 1975, § 12-24-2. (Motion at 1). Contrary to this statement of the question, what is actually presented is the issue of jurisdiction under Rule 18, Supreme Court Rules. The motion to dismiss filed by AOC discusses only its view of the merits of the appeal. It makes no jurisdictional argument. We must assume AOC does not challenge jurisdiction.

However, Rule 18(12), Supreme Court Rules, allows the Court to dismiss the appeal on the merits after reviewing the jurisdictional documents.

Plaintiffs, therefore, with regard to Rule 18(12) reply herein to AOC's attack on the merits of the appeal.

II.

STANDARDS FOR GRANTING AOC'S MOTION TO DISMISS

AOC does not state what standard of review it claims is applicable to this appeal. The standard of review to be applied to this appeal by this Court reviewing the panel decision ("Opinion") is *de novo* because it involves only questions of law. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 2546, 101 L.Ed.2d 490 (1988). The basic question of law is whether the Rule 12(b), *Fed.R.Civ.P.*, motion to dismiss should have been granted.

It is not stated in the motion to dismiss which, if any, of the Rule 12(b) grounds for dismissal is invoked as a basis for dismissal. (AJS Appendix F). The Opinion did not state what standard it applied in granting the motion to dismiss. (AJS Appendix A). Plaintiffs' analysis of the motion indicates that the motion is based on failure to state a claim. Rule 12(b)(6), *Fed.R.Civ.P.*

In its recent decision of *Bell Atlantic Corporation, et al. v. Twombly, et al.*, ___U.S.___, 127, S.Ct. 1955, 167 L.Ed.2d 929 (2007), this Court did away with the long standing rule of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957),

that a motion to dismiss based on Rule 12(b)(6) should be denied unless it was clear beyond doubt that no facts could be proved that would support a claim for relief. In *Twombly*, the Court changed the rule to provide that in order to overcome a motion to dismiss the plaintiff must plead enough facts to make the claim plausible on its face. The Court stated that the plaintiff must "nudge" the claim across the line from "conceivable" to "plausible." AOC did not call the *Twombly* case to the panel's attention and the Opinion does not mention it.

The question that should have been decided by the Panel on June 8, 2007, two weeks after *Twombly* was decided, was whether the complaint survived the *Twombly* test by stating sufficient facts to make Plaintiffs' claims plausible. The word "plausible" is defined in *The American Heritage Dictionary*, Second College Edition, as "seemingly true, acceptable, seemingly honest, trustworthy." The question before this Court if it decides to consider the merits of this appeal under Rule 18(12) is to determine, based on *de novo* review, if the facts alleged establish that Plaintiffs' claims for relief are "plausible." One way to test whether allegations are plausible is to determine whether the opposing position is implausible. AOC's position on the merits of this appeal is implausible.

The AOC's position is that even though the complaint alleges that numerous Alabama judges have asked AOC for a decision as to whether they should obey the Statutes and even though AOC has replied to them that the Statutes must be precleared (under § 1973c) and that the AOC will not enforce them until

they are precleared, the AOC has no authority or duty to receive such inquiries or to make such responses. The complaint alleges that AOC did accept these inquiries and did make these responses. (AJS, Appendix E at 33-35). The Opinion does not even consider the import of these facts.

The Opinion in granting AOC's motion looked only to AOC's duty under the Statutes in question ("Statutes") and failed to consider AOC's powers and duties in the enforcement of all statutes and the overall supervision of the Alabama court system. (See, *e.g. Ala.Code*, 1975, §§ 12-5-3, 6, 9, 10 and 13).

III.

THE "STANDING" ISSUE

The allegations of the complaint state that the Plaintiffs are plaintiffs in cases pending in state court before judges who have received more than $2,000.00 from opposing parties and counsel so that if the Statutes were enforced they could automatically recuse those judges. Plaintiffs ask for a determination that the Statutes do not require preclearance under 42 U.S.C. § 1973c and for appropriate orders to the AOC to enforce the Statutes. Alternatively, Plaintiffs seek reference of the Statutes to the Department of Justice. (AJS, Appendix E).

The AOC according to the complaint has blocked enforcement of the Statutes by insisting to members of the Alabama judiciary that the Statutes must be precleared before they can or will be enforced. The

Opinion states that previously the Plaintiffs sued the Alabama Attorney General who is responsible for submitting the Statutes for preclearance, but because the Plaintiffs and the Attorney General agreed that the Statutes did not require preclearance, there was no case or controversy and that case was dismissed. The panel sitting on that case made that ruling even though the present Attorney General, and his predecessors in office, whose duty it is to both enforce Alabama law and to submit Alabama laws for preclearance under § 1973c, had never made any attempt to enforce the Statutes or submit them for preclearance.

The Opinion states that Plaintiffs have no standing to bring this action because: (1) AOC has no duty to enforce the Statutes; (2) Plaintiffs do not allege any injury caused by the non-enforcement of the disclosure requirements of subsection(a) of the Statutes; and (3) AOC cannot redress Plaintiffs' injuries. The Opinion holds that any injury to Plaintiffs alleged in this case "is the result of inaction of third parties not before this panel, the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama." (AJS, App. A at 16).

(a) **The Duty of the AOC Relative to the Statutes**

The complaint alleges that for a period of 18 months, January of 1999 to June of 2000, numerous Alabama circuit judges wrote the AOC and asked it whether they should comply with the Statutes. These

judges based their decision to obey or not obey the Statutes on what the AOC told them, not the officials listed in the Opinion as responsible for enforcing the Statutes. The judges followed the AOC opinion rather than the Alabama Attorney General's opinion. The Opinion does not discuss this allegation, much less analyze its significance.

It is plausible that Alabama judges have relied on AOC in deciding whether to obey the Statutes. They obviously believed AOC had the power to make the determination as to the enforceability of the Statutes. It is implausible that they relied for this purpose on an entity that, as the AOC now puts it, had "no authority, responsibility, obligation or duty" to enforce the Statutes. The Statutes provide that judges who do not comply with them lose their pay. No one would rely on a helpless entity at the risk of losing their pay, particularly in view of the Alabama Attorney General's contrary opinion.

The AOC replied to these judges that, "...our office must agree that until this legislation is precleared, it is not legally enforceable and our office will not take any action for non-compliance with the [Statutes]...". (AJS, Appendix E at a34). Is it plausible that given the source of these questions and answers and the plain language involved that AOC did not believe it had the power to enforce or not enforce the Statutes? AOC clearly claimed to have the "authority, responsibility, obligation or duty" to enforce the Statutes. AOC did not tell the judges who relied on it,

as it now represents to the federal court, that it had no power or duty to decide whether the Statutes should be enforced. It did not tell the inquiring judges that they should write the state officials named in the Opinion as the only officials with the power to enforce the Statutes. Instead, AOC defied the Alabama Attorney General's opinion with its own contrary opinion delivered to Alabama judges.

(b) The Power of the AOC Under Alabama Law

In order to give some idea of the power of AOC, consider that it has with impunity defied the opinion of the Alabama Attorney General and the Alabama Governor by taking the position contrary to those officials that the Statutes require preclearance. Moreover, this contrary opinion has been communicated by AOC to Alabama judges to direct their disregard of these duly enacted Statutes. Those judges have followed AOC rather than the Attorney General. Finally, the Attorney General and the Governor of Alabama have refused to attempt to enforce the Statutes in the face of AOC's defiance. All of this is clear from the facts pled in the complaint and makes it clear that Plaintiffs' claims are plausible.

The Opinion came to its erroneous ruling granting the motion to dismiss by considering only the role of the AOC stated in the Statutes instead of viewing AOC's power to enforce all statutes applicable to the Alabama court system. These AOC statutes are set out in AJS pages 7-12. In particular, the Court is referred to *Ala.Code*, 1975, § 12-5-6 (AOC responsible

for trial court administration); § 12-5-9 (AOC to assist Alabama's Chief Justice as administrative head of Alabama judicial system; § 12-5-10(1), (3), and (13) (performance of duties relating to preparation of filing of reports and liaison between courts and other branches of state government).

In *Steigmaier v. Trammell*, 597 F.2d 1027, 1034-1038 (5th Cir. 1979), the court analyzed the role of the Alabama Administrative Director of the Courts. The court concluded that, "...applicable Alabama constitutional and statutory provisions clearly reflect that policymaking decisions with regard to the operation of the Circuit Clerk's office in the Alabama unified judicial system are made by the Administrative Director of the Courts, not the Circuit Clerks." (*id.* at 1034-1035).

On October 9, 1975, the Alabama Legislature adopted a measure designed to implement the new judicial article of the Alabama Constitution. Act No. 1205, 1975 *Ala.Acts* (codified in scattered sections of *Ala.Code* tit. 12 (1975)). Under this act the AOC was created. *Ala.Code* tit. 12, § 12-5-1 (1975).

Under Alabama's unified judicial system, the AOC is the state department charged with the duty of assisting the Chief Justice of the Supreme Court of Alabama in connection with his duties as chief administrative officer of the courts. *Id.* § 12-5-3(a). Among other duties, the AOC is required to work with the clerks of all state courts to "collect, obtain, compile and digest information and statistics concerning the administration of justice in the state." *Id.* §

12-5-3(b)(1). "Unless the chief justice otherwise directs, the department of court management, under the direction of the administrative director of courts, shall have the responsibility for trial court administration." *Id.* § 12-5-6. See also *id.* § 12-5-8 (administrative director of courts ex officio head of department of court management and head of administrative office of courts).

In short, the AOC runs the Alabama courts. That is no doubt the reason that judges asked AOC what to do about obeying the Statutes and did what the AOC directed.

(c) Redressability

The Opinion fails to consider that Plaintiffs' direct injury is that they must as a result of the AOC's preclearance position try their cases before judges who are presumptively biased in favor of their opponents. If the AOC had responded to the judicial inquiries that, based on the Attorney General's opinion or otherwise, the Statutes would be enforced, there can be no plausible doubt that the Statutes would have been obeyed by the judiciary, including Plaintiffs' assigned judges. In fact, the only thing that under the allegations in the complaint is inhibiting enforcement of the Statutes in Alabama is the position of the AOC. Otherwise, Plaintiffs would be able to recuse their present judges and their injuries would be redressed.

It is remarkable that the only Alabama officials mentioned in the Opinion as the ones that have injured Plaintiffs do not believe preclearance is necessary.

But, they defer to the AOC's contrary opinion. Those officials have made no effort to overrule the AOC and to enforce the Statutes. The opinion of the AOC alone is controlling the Alabama judiciary and preventing the enforcement of the Statutes. The AOC obviously has the last word in the matter.

The purpose of § 1973c is to provide a method for making certain that changes in the law comply with the Voting Rights Act. There must be a threshold in deciding whether a statute has the characteristics that Congress intended them to have in order to require submission to the DOJ for determination as to Voting Rights Act compliance. The Panel was asked in the complaint in this case to decide if the Statutes required preclearance or not. It was the stated goal of Plaintiffs to have the Statutes declared outside the requirement of preclearance, not to require preclearance. The AOC is the only state agency claiming the Statutes require preclearance and all others are deferring to the AOC's position. Of course, the AOC can redress Plaintiffs' injury.

IV.

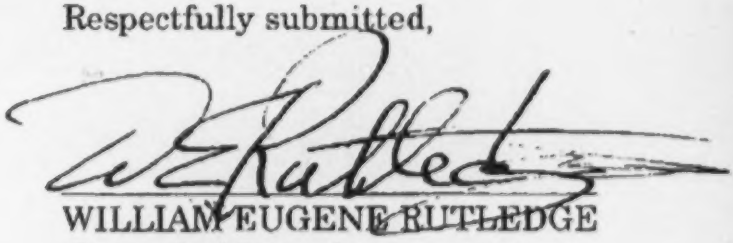
CONCLUSION

The Opinion has *ex mero motu* contrived a "standing" argument to dismiss the complaint to which the parties have not been allowed to respond. That "standing" argument ignores the plausibility of Plaintiffs' claims asserted in the complaint. It has also contrived a "no redressability" argument that makes no sense. The complaint makes it clear that the only

thing standing between Plaintiffs and being able to recuse their present judges, who are presumptively biased against them, is the AOC and its preclearance position. The injunction sought would completely redress the injury.

Plaintiffs pray that this Court will take jurisdiction of this appeal and establish a briefing schedule on the merits. Alternatively, Plaintiffs pray that this Court will summarily reverse the three judge district court and remand this case for further proceedings.

Respectfully submitted,



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